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# TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1888.

No. ~~1130~~ 782 ~~461~~ / 20

THE CITY OF BRENHAM, PLAINTIFF IN ERROR,

*vs.*

THE GERMAN-AMERICAN BANK.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF TEXAS

FILED SEPTEMBER 26, 1888.

# SUPREME COURT OF THE UNITED STATES.

## OCTOBER TERM, 1888.

## No. 1136.

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## THE CITY OF BRENHAM, PLAINTIFF IN ERROR,

*vs.*

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IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF TEXAS.

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1 In the Circuit Court of the United States for the Fifth Circuit and Western District of Texas, at Austin.

[The Seal of the U. S. Circuit Court, Western Dist. Texas, Austin.]

CITY OF BRENHAM, Plaintiff in Error,
*vs.*
GERMAN-AMERICAN BANK, Defendant in Error.

Honorable Aleck Boarman, district judge, presiding.

Be it remembered that at an adjourned term of the circuit court of the United States for the fifth circuit and western district of Texas, held at Austin, in April, A. D. 1888, Honorable Aleck Boarman, district judge, presiding, the following, among other, proceedings were had:

*Plaintiff's Original Petition. Filed Nov'r 8th*, 1886.

In the Circuit Court of the United States in and for the Western District of Texas, at Austin, Texas.

THE GERMAN-AMERICAN BANK
*vs.*
THE CITY OF BRENHAM. } No. 2092.

To the honorable the judges of the circuit court of the United States in and for said district:

The petition of "The German-American Bank," hereinafter styled plaintiff, complaining of "The City of Brenham," hereinafter styled defendant, respectfully represents—

That plaintiff is a corporation duly chartered and incorporated under the name and style of "The German-American Bank" by the laws of the State of New York, and is a citizen of and has its domicile and place of business in the city and county and State of New York.

That said defendant is a municipal corporation duly chartered and incorporated under the name of "The City of Brenham"
2 by the laws of the said State of Texas, and has its domicile in the county of Washington, in said State of Texas, in the district aforesaid, and is a citizen of said county, State, and district, having a common seal as a corporation and invested with all the powers and privileges usually granted by the laws of said State of Texas to municipal corporations, including the right and power to make contracts, sue and be sued, and by and under its charter, approved February 4th, 1873, and in force at the times and in the matters hereinafter stated, invested with and possessed of the right and power to borrow for the general purposes of said city and on the credit thereof a sum or sums of money not to exceed in the aggregate the sum of fifteen thousand dollars, and to secure the repayment of said sum or sums, with interest thereon, by the execution and sale and delivery of its negotiable bonds and coupons or other obligations or in any other manner chosen and adopted by its council.

That thereafter and at the times hereinafter stated and by virtue of the power aforesaid, duly exercised and for the purposes aforesaid, the said defendant, for value received, did make, execute, sell, and deliver to various and sundry persons and put in circulation in the markets on the respective dates thereof its ninety-two several bonds, signed by its mayor, M. P. Kerr, and by its secretary, C. H. Carlisle, and sealed by its corporate seal, each and all of said bonds being of date, to wit, the 31st day of July, 1879, and due twenty years after date, numbers one (1) to fifty (50), inclusive, thereof being for fifty dollars each; numbers fifty-one (51) to seventy-five (75), inclusive, thereof being for one hundred dollars each; numbers
3 seventy-six (76) to eighty-nine, inclusive, thereof being for five hundred dollars each, and numbers ninety (90) to ninety-two (92), inclusive, thereof being for one thousand dollars each—

Each of said bonds having been authorized by and issued and sold and delivered by defendant for the purpose aforesaid by an ordinance duly passed by it on June 7th, 1879.

That each of said bonds recites substantially that defendant is indebted to bearer in the sum therein specified, in lawful money of the United States, with interest from the date thereof, inclusive, at the rate of ten per cent. per annum, payable semi-annually on the first days of March and September of each year, on presentation of the proper coupons attached thereto, and that each of said bonds and said interest thereon are payable at the office of the treasurer of said defendant, and redeemable after ten years at the option of the defendant, and that said bonds and the coupons attached thereto were issued, executed, sold, and delivered and put in circulation under authority of an ordinance of defendant, approved June 7th, 1879, entitled "An ordinance to provide for the issue and sale of fifteen thousand dollars in coupon bonds of the city of Brenham to borrow money for general purposes," and each of said bonds has on the face thereof the following: "This bond is authorized by an ordinance of the city of Brenham, approved June 7th, 1879."

That said bonds at the said date of their said issuance, execution, sale, and delivery had attached thereto a number of coupons for interest accruing and to accrue thereon from their said dates,
4 respectively, inclusive, which were also duly executed and sold and delivered and put in circulation by defendant in like manner and with the bonds aforesaid at said date, respectively, and in that number were included six certain coupons attached to said bond number one for fifty dollars (they, the said coupons, being numbered from eight (8) to thirteen (13), inclusive), for two and $\frac{50}{100}$ dollars ($2.50) each, the first of said coupons, or number eight (8), due March first, 1883; the second, or number nine (9), due September first, 1883; the third, or number ten (10), due March first, 1884; the fourth, or number eleven (11), due September first, 1884; the fifth, or number twelve (12), due March first, 1885; the sixth, or number thirteen (13), due September first, 1885.

That to other fifty-dollar bonds aforesaid, numbered from two to thirty, inclusive, there were attached, respectively, a like number of coupons as to said bond number one, and in that number there were

attached to each of said bonds six (other) certain coupons numbered from eight (8) to thirteen (13), inclusive, respectively, and that each of said coupons on each of said bonds from number two (2) to number thirty (30), inclusive, are of the same amounts and mature at the same dates, respectively, as those before mentioned as belonging to said bond number one (1); that to said fifty-dollar bonds, from number thirty-one (31) to fifty (50), inclusive, respectively, there were attached to each five certain other coupons, numbered from eight to twelve, inclusive, respectively, and that each of said coupons on each of said bonds, from number thirty-one to fifty, inclusive, are respectively of the same amounts and mature, respectively, at the same date as those, to wit, from 8 to 12, inclusive, mentioned in said bond No. 1 and hereinbefore referred to.

5 That to said bond number fifty-one (51), for one hundred dollars, there was also attached five certain (other) coupons, numbered from eight (8) to twelve (12), inclusive, for five dollars each, the first, or number eight (8), maturing March 1st, 1883; the second, or number nine (9), September 1st, 1883; the third, or number ten (10), March 1st, 1884; the fourth, or number eleven (11), September 1st, 1884; the fifth, or number twelve (12), March 1st, 1885.

That to each of the said other one-hundred-dollars bonds, numbered, respectively, from 52 to 75, inclusive, there were attached, respectively, a like number of coupons as to said bond number fifty-one (51), and that said last-named coupons are of the same number and amounts, respectively, and mature, respectively, at the same dates as those hereinbefore referred to belonging to said bond No. 51.

That to said bond numbered seventy-six (76), for five hundred dollars ($500), there were also attached six certain (other) coupons for twenty-five dollars each and numbered from 8 to 13, inclusive, respectively, the first, or number 8, maturing March 1st, 1883; the second, or number 9, September 1st, 1883; the third, or number 10, March 1st, 1884; the fourth, or number 11, September 1st, 1884; the fifth, or number 12, March 1st, 1885; the sixth, or number 13, September 1st, 1885.

That to each of the said five-hundred-dollar bonds, numbered, respectively, from 77 to 89, inclusive, there were attached, respectively, a like number of coupons as to said bond number 76, and that said last-named coupons are of the same numbers and amounts, respectively, and mature, respectively, at the same dates as those hereinbefore referred to as belonging to said bond No. 76.

6 That to said bond numbered 90, for one thousand dollars ($1,000), there were attached five certain other coupons, for fifty dollars each, numbered from 8 to 12, inclusive, respectively, the first, or No. 8, due March 1st, 1883; the second, or No. 9, September 1st, 1883; the third, or No. 10, March 1st, 1884; the fourth, or No. 11, September 1st, 1884; the fifth, or No. 12, March 1st, 1885.

That to each of the other of the said one-thousand-dollar bonds, numbered, respectively, from 91 to 92, inclusive, there were attached, respectively, a like number of coupons as to said bond numbered ninety, and that said last-named coupons are of the same number

and amounts, respectively, and mature, respectively, at the same dates as those hereinbefore referred to as belonging to said bond number 90.

That at the time of the issuance, sale, and delivery and circulation of each and all of the bonds hereinbefore referred to there were attached to each of them, respectively, certain other coupons different from those hereinbefore mentioned and numbered from 1 to 7, inclusive, and that all of said other different coupons have heretofore been paid by defendant.

That the aforesaid coupon No. 8, which was attached to the aforesaid bond No. 1, for fifty dollars, is in substance and effect as follows:

"The City of Brenham will pay to bearer two dollars $\frac{50}{100}$ for six months' interest, due March 1st, 1883, at the office of the city treasurer, on bond No. 1.

"M. P. KERR, *Mayor.*

"C. H. CARLISLE, *City Secretary.*"

7 And that all of said coupons sued on herein are of same date, to wit, 31st July, 1879, and are in substance and effect of the same form as that above set forth, except as to the time of maturity, numbers, amounts, and number of bond to which attached; that in due course of trade and for a valuable consideration plaintiff became and is now the legal owner and holder of each and all of said bonds and coupons, and that plaintiff became such owner and holder in good faith and for a valuable consideration; that each of said bonds and coupons were transferred and delivered to plaintiff and those from whom plaintiff acquired the same for valuable consideration as aforesaid and long before the maturity of said coupons or any of them; that by reason of the premises aforesaid, to wit, the issuance, execution, and sale and delivery and circulation of its bonds and coupons aforesaid and the subsequent transfer and delivery thereof, for value as aforesaid, to plaintiff, the said defendant became liable and promised to pay to plaintiff or the bearer thereof the several sums of money therein mentioned, with lawful interest thereon, according to the tenor and effect thereof, whenever thereunto requested; but, although the sums of money shown by said coupons to be due have long been due and unpaid and said coupons have often been presented by plaintiff to defendant for payment, yet to pay said coupons or any of them (except those before mentioned) or any portion of any of them has the said defendant hitherto wholly failed and refused and still fails and refuses, to plaintiff's great damage, to wit, the full amount of said unpaid coupons, with interest on each of them from their said maturity, respectively, at eight per cent. per annum.

8 Wherefore plaintiff brings this suit, and prays that said defendant be cited to answer hereto, and that plaintiff have judgment against said defendant for its said debt, interest, and costs of suit.

DAVIS, DAVIDSON & MINOR,
*Counsel for Plaintiff.*

(Indorsed:) No. 2092. In the circuit court of the United States in and for the western district of Texas, at Austin. The German-American Bank *vs.* The City of Brenham. Original petition. Filed November 8th, 1886. Sam'l Hopkins, clerk, by W. E. Turner, deputy. Davis, Davidson & Minor, counsel for plaintiff.

*Defendant's Original Answer. Filed March 30th,* 1887.

In the United States Circuit Court, at Austin. At Law.

THE GERMAN-AMERICAN BANK
*vs.*
THE CITY OF BRENHAM. } No. 2092.

Comes now The City of Brenham, defendant in the above-entitled cause, and, protesting against the jurisdiction of the court, says that said plaintiff, The German-American Bank, is not the real and *bona fide* owner and holder of the coupons set forth in its petition and has no title thereto; but defendant says that G. H. Mensing, who is a citizen of Texas and resident of the county of Galveston, is the real owner of the said coupons, and that the transfer or delivery of said coupons by said Mensing to plaintiff was colorable only and for the purpose of enabling suit to be instituted thereon in this court; all of which defendant is ready to verify.

9 Wherefore defendant prays that this suit abate and be dismissed at the cost of plaintiff.

MAXEY & FISHER AND
PEELER & PEELER,
*Attorneys for Defendant.*

THE STATE OF TEXAS, *County of Washington:*

Before me, H. M. Lewis, a county clerk within and for said county and State, on this day personally appeared E. C. Abbott, who, being first duly sworn, deposes and says that he is the duly authorized agent of The City of Brenham, defendant in the above-entitled suit, and is authorized to make this affidavit; that the statements of fact set forth in the foregoing plea in abatement are true, to the best of his knowledge and belief.

E. C. ABBOTT.

Sworn to and subscribed before me this the 27th day of March, A. D. 1887.

H. M. LEWIS,
*Co. Cl'k Wash. Co., Tex.*

In the United States Circuit Court, at Austin. At Law.

THE GERMAN-AMERICAN BANK
*vs.*
THE CITY OF BRENHAM. } No. 2092.

The said City of Brenham, defendant in the above-entitled cause,

not waiving, but expressly relying upon its aforesaid plea in abatement and to the jurisdiction and only in the event that the same be considered insufficient and held for naught, demurs to the petition of plaintiff and says—

10 1. That said petition fails to show any warrant or authority for the defendant, under the constitution of Texas, to issue the bonds and interest coupons therein declared upon.

2. That petition is fatally defective because it does not specify for what purpose the bonds and coupons were issued, and discloses no facts which would authorize defendant to issue negotiable bonds with interest-bearing coupons.

Wherefore defendant prays judgement of the court.

MAXEY & FISHER AND
PEELER & PEELER,
*Attorneys for Defendants.*

And not waiving, but expressly relying upon the plea in abatement and to the jurisdiction above set forth, and only in the event that the same be considered insufficient and held for naught, this defendant, answering said petition, denies all and singular the allegations in the same contained, except such as may hereinafter be admitted, and requires proof thereof.

Specially answering, the defendant says—

1. That it is a municipal corporation, having a population of less than ten thousand inhabitants, incorporated on the 4th day of February, 1873, under the constitution and laws of Texas, with powers and privileges limited and restricted by the law of its immediate creation and the constitution of the State; that as such corporation it has no power now, nor did it have on the 7th day of June, 1879, to make, pass, or enact resolutions, ordinances, or by-laws repugnant to the constitution and laws of said State, but all such resolutions, ordinances, and by-laws must conform thereto or otherwise be invalid and inoperative; that under the provisions of the

11 State constitution, adopted in the year 1876, and prior to the passage of the ordinance of June 7th, 1879, in plaintiff's petition mentioned, cities and towns with a population of ten thousand inhabitants or less have authority to levy, assess, and collect an annual tax, in current money, to defray only the current expenses of their local government, and are without power to borrow money, issue negotiable bonds therefor, and collect taxes for the payment of the same. Wherefore defendant says that on said 7th day of June, 1879, no power existed in its said city council to pass the ordinance of that date, and all bonds and interest-bearing coupons which are issued in pursuance thereof are without validity and constitute no legal liability against it.

2. Further answering, defendant admits that the bonds specified in plaintiff's petition were signed by its mayor and secretary, and that the printing of the signatures to the aforesaid coupons was authorized by said mayor and secretary, but defendant says that neither the mayor nor secretary nor both of said officers was authorized to execute the said bonds and coupons, and defendant avers the same

were issued without authority of law and in direct violation of the said ordinance of June 7th, 1879, for this, that said ordinance authorized the execution and issuance of fifteen thousand dollars of bonds, payable twenty years after the date thereof, and to be redeemable, at the option of defendant, at any time after five years from their date, and the defendant avers that the supposd bonds described in plaintiff's petition can only be redeemed by defendant, according to the recitals appearing upon their face, after the
12 expiration of ten years from the date thereof. Wherefore defendant says that the execution and issuance of said bonds were wholly unauthorized, and the same are null and void.

3. Further answering, defendant says it is provided in section 4, article 11, of the constitution of the State of Texas that no county, city, or other municipal corporation shall become a subscriber to the capital stock of any private corporation or association or make any appropriation or donation to the same or in anywise loan its credit; that the prohibition in said article contained denied defendant the right to make an appropriation or donation to any railroad company or in anywise loan its credit in aid of or for the benefit of any railroad corporation; but, notwithstanding the constitutional restriction and inhibition above set forth, defendant says that its city council did, on the said 7th day of June, 1879, pass the ordinance above referred to, authorizing the issuance of fifteen thousand dollars of city bonds, redeemable after ten years from date thereof, three thousand dollars of which — for the benefit of the fire department of defendant and the remaining twelve thousand being in aid of the Gulf, Colorado and Santa Fé Railroad Company, in providing for the purchase of right of way over the streets of defendant and to the purchase of depot grounds in order to secure the construction of said railroad through the said city of Brenham; that said bonds so authorized to be issued for the railroad purpose aforesaid were sold by defendant to the following-named persons: Giddings & Giddings, $5,000; the said G. H. Mensing, $5,000, and to F. A. Engleke, $2,000; that thereafter the said Mensing became the owner and holder
13 of the bonds previously purchased by Giddings & Giddings and Engelke from defendant, and is now the real owner and holder of the same; that said Giddings & Giddings, Mensing, and Engelke purchased said bonds with actual and personal knowledge of the purpose for which they were issued, as well as record notice of such illegal purpose as disclosed by the public records and minutes of defendant's city council.

Wherefore defendant says that said bonds and interest-bearing coupons are null and void and constitute no legal charge against it.

4. Further answering, defendant says that if the plaintiff be the owner of said bonds and coupons it purchased the said coupons after their maturity and with knowledge of all the facts and circumstances attending the issuance of the same, well knowing they were issued to raise money for the purpose of enabling defendant to purchase the right of way and depot grounds for the Gulf, Colorado

and Santa Fé Railroad Company—an illegal purpose and one for which this defendant was not authorized to issue negotiable bonds.

MAXEY & FISHER,
PEELER & PEELER,
*Att'ys of Def'd't.*

(Indorsed:) No. 2092. The German-American Bank *vs.* The City of Brenham. Defendant's original answer. Filed March 30th, 1887. Samuel Hopkins, clerk.

*Defendant's Amended Original Answer. Filed April 24th, 1888.*

In the United States Circuit Court, at Austin. At Law.

THE GERMAN-AMERICAN BANK
*vs.*
THE CITY OF BRENHAM. } No. 2092.

14 Comes now The City of Brenham, defendant in the above-entitled cause, by attorney, leave of the court being first had and obtained, and amends its demurrers and answer heretofore filed in this cause.

The said defendant, not waiving but still insisting on its plea in abatement and to the jurisdiction and, in the event the said plea in abatement and to the jurisdiction be overruled, demurring to the petition of plaintiff, says that said petition is insufficient in law, because—

1. It does not specify the purpose for which said bonds and coupons were issued.

2. It does not appear therefrom that defendant was authorized by the constitution and laws of Texas to issue the alleged bonds and the interest-bearing coupons declared upon.

Wherefore defendant prays the judgment of the court.

MAXEY & FISHER,
PEELER & PEELER,
*Attorneys for Defendant.*

And defendant specially excepts to said petition because the ordinance of June 7th, 1879, of the city of Brenham is not therein set forth nor is the substance of said ordinance given.

Wherefore defendant prays judgment of the court.

MAXEY & FISHER,
PEELER & PEELER,
*Attorneys for Defendant.*

And should the said plea in abatement and to the jurisdiction be held insufficient, upon which defendant still relies, defend-
15 ant, in answer to said petition, denies all and singular the allegations in the same contained, except such as may be hereinafter admitted, and requires strict proof thereof.

Specially answering, the defendant says—

1. That it is a municipal corporation, having a population of less than ten thousand inhabitants, incorporated on the 4th day of February, 1873, under the constitution and laws of Texas, with powers and privileges limited and restricted by the law of its immediate creation and the constitution of the State; that, as such corporation, it has no power now nor did it have on the 7th day of June, 1879, to pass or enact resolutions, ordinances, or by-laws repugnant to the constitution and laws of said State, but all such resolutions, ordinances, and by-laws must conform thereto or otherwise be invalid and inoperative; that under the provisions of the State constitution, adopted in the year 1876, and prior to the passage of the ordinance of June 7th, 1879, in plaintiff's petition mentioned, cities and towns with a population of 10,000 inhabitants or less have authority to levy, assess, and collect an annual tax in current money to defray only the current expenses of their local government, and are without power to borrow money, issue negotiable bonds therefor, and collect taxes for the payment of the same. Wherefore defendant says that on said 7th day of June, 1879, no power existed in its city council to pass the ordinance of that date, and all bonds and interest-bearing coupons which were issued in pursuance thereof are without validity and constitute no legal and subsisting liability against it.

16 2. Defendant admits that the bonds specified in plaintiff's petition were signed by its mayor and secretary, and that the names of the mayor and secretary were printed on the coupons, and defendant says that the ordinance authorizing such printing of the signatures of the mayor and the secretary was illegal and void and the bonds issued thereunder invalid.

3. The ordinance aforesaid was further invalid and the bonds issued thereunder void, because the ordinance failed to provide for the payment of the interest on said bonds and to provide an adequate sinking fund for the payment of said bonds, as required by the constitution and laws of the State.

4. The said ordinance was further invalid in that it authorizes the coupons attached to said bonds to be received in payment of taxes, in direct contravention of the constitution and laws of the State.

5. Defendant further says that neither the mayor nor secretary nor both of said officers was authorized to execute the said bonds and coupons, and defendant avers the same were issued without authority of law and in direct violation of the said ordinance of June 7th, 1879, for this, that said ordinance authorized the execution and issuance of fifteen thousand dollars of bonds, payable twenty years after the date thereof and to be redeemable, at the option of the defendant, at any time after five years from their date; and the defendant avers that the supposed bonds described in plaintiff's petition can only be redeemed by defendant, according to the recitals appearing upon their face, after the expiration of ten years from the date thereof. Wherefore defendant says that the execution

17 and issuance of said bonds were wholly unauthorized and the same are null and void.

6. Further answering, defendant says it is provided in section 4, article 11, of the constitution of the State of Texas that no county, city, or other municipal corporation shall become a subscriber to the capital stock of any private corporation or association or make any appropriation or donation to the same, or in anywise loan its credit; that the prohibition in said article contained denied the defendant the right to make an appropriation or donation to any railroad company or in anywise loan its credit in aid of or for the benefit of any railroad corporation; but, notwithstanding the constitutional restriction and inhibition above set forth, defendant says that its city council did, on the said 7th day of June, 1879, pass the ordinance above referred to, to authorize the issuance of fifteen thousand dollars of city bonds, redeemable after five years from date thereof, and said bonds were really and in fact issued in aid of the Gulf, Colorado and Santa Fé Railroad Company for the purchase of right of way over the streets of defendant and for the purchase of depot grounds in order to secure the construction of said road through the said city of Brenham; that said bonds so authorized to be issued for the railroad purpose aforesaid were sold by defendant to the following-named persons: Giddings & Giddings, $5,000, the said G. H. Mensing, $5,000, and to F. A. Engelke, $2,000; that thereafter the said Mensing became the owner and holder of the bonds previously purchased by Giddings & Giddings and Engelke from defendant and the remaining $3,000 of the issue of fifteen
18 thousand dollars, and is now the real owner and holder of the same; that said Giddings & Giddings, Mensing, and Engelke purchased said bonds with actual and personal knowledge of the unlawful purpose for which they were issued, as well as record notice of such illegal purpose as disclosed by the public records and minutes of defendant's city council. Wherefore defendant says that said bonds and interest-bearing coupons are null and void and constitute no legal charge against it.

7. Further answering, defendant says that if the plaintiff be the owner of said bonds and coupons it purchased the said coupons after their maturity and with knowledge of all the facts and circumstances attending the issuance of the same, well knowing that neither the said mayor nor secretary had authority under the ordinance aforesaid, nor the defendant under the constitution and laws of the State, to issue the same, and with knowledge that they were issued to raise money for the purpose of enabling defendant to purchase the right of way and depot grounds for the said Gulf, Colorado, and Santa Fé Railroad Company—an illegal purpose and one for which this defendant was not authorized to issue negotiable bonds.

8. Defendant further says that said bonds are illegal and void because they do not specify the purpose for which they were issued; nor have they ever been registered with the comptroller, as required by said ordinance and laws of the State.

9. Further answering, defendant says that at the date of the passage of said ordinance of June 7th, 1879, the current ex-
19 penses of defendant for ordinary municipal purposes was more than sufficient to absorb the current revenues derived

from taxation within the constitutional limit, and there was no power in defendant to levy a tax to pay the interest and provide a sinking fund to meet the principal of said supposed bonds.

Wherefore said bonds are null and void.

And, further answering, defendant says that prior to the time the bonds and coupons aforesaid were issued defendant had issued five thousand dollars of bonds for general purposes which were outstanding at the time the bonds in suit were issued, and the bonds and coupons declared upon in this suit are void.

Defendant hereby withdraws all averments in its answer heretofore filed which are inconsistent with the averments herein contained.

MAXEY & FISHER &
PEELER & PEELER,
*Attorneys for Defendant.*

(Indorsed:) 2092. German-American Bank *vs.* City of Brenham. Amended original answer of defendant. Filed April 24th, 1888. D. H. Hart, clerk.

*Plaintiff's First Supplemental Petition. Filed Ap'l* 24, 1888.

In U. S. Circuit Court for Western District of Texas, at Austin.

THE GERMAN-AMERICAN BANK
*vs.*
THE CITY OF BRENHAM. } No. 2092.

Now comes the plaintiff in the above cause and with leave of the court files this its first supplemental petition, and demurs to the answers of defendant on file herein, and says that said answers are wholly insufficient in law and show no valid grounds of defense to plaintiff's action herein, and of this the plaintiff prays the judgment of the court.

And said plaintiff specially excepts to each and every portion of said answer, and, among others, sets down the following exceptions thereto:

1st. That the plea of abatement of defendant to the jurisdiction of this court is wholly insufficient, being and consisting of mere general statements, and the citizenship of all the parties herein mentioned and of this defendant are not therein stated, and said plea of abatement is not sworn to in the manner provided by law, the deponent thereto only stating that such plea is true to the best of his knowledge and belief.

2nd. To all that part of amended answer of defendant contained in section 1 thereof, setting up the want of power in defendant to issue the bonds and coupons referred to in plaintiff's petition, it not appearing from such allegations and the constitution and laws of the State of Texas that defendant was prohibited by law from issuing and delivering the said bonds and coupons or that the acts of defendant were *ultra vires* and of no effect.

3rd. To all that part of said amended answer contained in section 2 thereof, alleging the illegality of the ordinance by reason of alleged manner of the making and execution of said coupons, said allegations being wholly irrelevant and immaterial to the question of plaintiff's right of recovery herein, and it does appear from said amended answer that such ordinance, with respect to said
21 coupons and otherwise, was and is legal and valid.

4th. To all that part of said amended answer contained and included in sections 3, 4, and 5 thereof, there being no sufficient or material matter set forth in said sections of said answer touching plaintiff's right of recovery herein; and it appears from said amended answer, with respect to the alleged inequality in the issuance of said bonds and the alleged variance between them and said ordinance, with respect to the right of redemption thereof, that such matters of alleged inequality are wholly immaterial to any issue in this cause and do not in any manner affect the right of plaintiff to recover herein.

5th. To all that part of said amended answer contained and included in sections 6 and 7 thereof, it not appearing therefrom or from the laws and constitution of said State that defendant did not have the power to issue bonds and coupons for the purpose in said answer alleged, to wit, for the purchase of the right of way and depot grounds for the said railroad through and within the corporate limits of defendant.

6th. To all that part of said amended answer contained in section 8 thereof, there being no matter set forth in said section affecting plaintiff's cause of action; and it does appear from the records and pleadings in this cause that said bonds were authorized and issued for the general and municipal purposes of defendant.

7th. To all that part of said amended answer included in section 9 thereof, the matters therein stated being immaterial and in
22 no manner affect the legality of the coupons sued on herein or the bonds to which they were attached.

And said plaintiff prays the judgment of the court of the foregoing demurrers and exceptions, and that the said answers of defendant be held insufficient and stricken out at defendant's costs.

DAVIS & DAVIDSON &
SAYLES & SAYLES,
*Att'ys for Plaintiff.*

Plaintiff, not waiving its foregoing demurrers and exceptions, but relying and insisting thereon in the event they should not be sustained and said answer stricken out, in response to the matters set up in the said answers, says—

1st. That at the date of the issuance of the said bonds the taxable values of the city of Brenham were sufficient under the laws then in force to authorize the issuance of said bonds, but if insufficient plaintiff or its said assignors had no notice thereof; that said city of Brenham was authorized by its special charter, granted in 1873, to issue the bonds and coupons of which are sued on.

2nd. That at the date of the issuance of said bonds—1879—the

city of Brenham had a population of more than one thousand people, and, in the absence of the provisions of its special charter, was authorized under the constitution and laws to issue the bonds, the coupons of which are sued on.

3rd. That the entire indebtedness of the city of Brenham at the date of the issuance of said bonds was within the limits fixed by law, but if not within such limits such excess, if any, was unknown to plaintiff or its said assignors.

23 4th. That the plaintiffs are the *bona fide* owners of said bonds and coupons; that if there are any irregularities in the issue of said bonds that plaintiff had no notice thereof at or before the time they became the legal owners and holders thereof, and that plaintiff is now advised that said bonds and coupons were issued under an ordinance of defendant, of date June 7th, 1879, a copy of which is hereto attached, marked "Exhibit A," and made a part and parcel of this answer; but plaintiff says that it or its said assignors had no notice or knowledge of said ordinance prior to or at the time of the issuance of said bonds and coupons, and had no notice or information or knowledge of any variance between said bonds and said ordinance, and that plaintiff and its said assignors became the owners and holders of said bonds in good faith and for value, and that plaintiff in this cause, being the holder and owner of all said bonds, is now and has always been ready and willing to surrender and deliver the same to defendant upon the payment of the amount due thereon, with interest, and now tenders to defendant the right of redemption of all said bonds and coupons, whether matured or not.

5th. That said Mensing Bros. & Co., the parties from whom plaintiff received said bonds, were *bona fide* purchasers before maturity of said bonds, having paid a valuable consideration therefor; that if there are any irregularities in said bonds that the said Mensing Bros. & Co. had no notice thereof at or before the time they became the legal owners and holders thereof.

24 6th. That said bonds were issued by the city of Brenham for general purposes, as said city was authorized to do; that if the proceeds of said bonds or any part thereof were misappropriated by the city council of the city of Brenham that neither these plaintiffs nor the said Mensing Bros. & Co. had notice of such facts; that if the proceeds of said bonds were misappropriated by the city council or agents of the city of Brenham that such misappropriation should not in anywise affect the rights of this plaintiff to recover on said bonds.

7th. That said bonds were sold by the lawfully authorized agents of the city of Brenham, and the said city of Brenham received full value for said bonds.

8th. The plaintiff further pleads that the said city of Brenham is estopped by its own acts above set forth from impeaching the validity of said bonds or the coupons attached thereto; and this plaintiff further pleads, by way of estoppel, that the said city of Brenham paid the interest on said bonds without objection for three years after the issuance thereof; that through its authorized agents and officers on, to wit, about the 23rd day of ——, 1884, it published a

statement of its financial condition and included in such statement as a part of its legal liabilities said fifteen thousand dollars of bonds and coupons attached, including the ones sued on, all of which was made known to these plaintiffs before they became the owners and holders of said bonds.

Wherefore said defendant should be forever estopped from denying its liability on said bonds.

Plaintiff prays, as in its original petition, for judgment on
25 said coupons, for interest thereon from their maturities, respectively, at eight per cent. per annum, and for costs of suit.

DAVIS & DAVIDSON &
SAYLES & SAYLES,
*Att'ys for Plaintiff.*

EXHIBIT "A" to 1st Supplemental Petition.

"EXHIBIT A."

An ordinance to provide for the issue and sale of fifteen thousand dollars in coupon bonds of the city to borrow money for general purposes.

Be it ordained by the city council of the city of Brenham:

SEC. 1. That the mayor be, and is hereby, authorized and empowered to have printed coupon bonds of the city of Brenham to the amount of fifteen thousand dollars.

SEC. 2. Said bonds shall be three (3) of the denomination of one thousand dollars ($1,000.00), fourteen (14) of the denomination of five hundred ($500.00) dollars, twenty-five (25) of the denomination of one hundred ($100.00) dollars, and fifty of the denomination of fifty ($50.00) dollars.

They shall be made payable to bearer twenty years after date, at the office of the treasurer of the city of Brenham, with interest from date until paid, at the rate of ten per cent. per annum, payable semi-annually, on the first days of September and March, at the office of the treasurer of the city of Brenham, but the city shall have the right to redeem said bonds at any time after five years from date.

SEC. 3. Said bonds shall be dated and interest begin to
26 run on the first day of ——, A. D. 18—, provided that should any of said bonds be sold at a subsequent date the amount of interest then due shall be endorsed as a credit on the coupons first due.

SEC. 4. Said bonds shall be signed by the mayor and countersigned by the city clerk, and the seal of the city shall be affixed, and they shall be numbered and registered as series 2, No. —, giving the number of the bond issued, commencing with No. 1.

SEC. 5. Coupons shall be attached to each of said bonds for each semi-annual installment of interest, which said coupon shall have printed thereto the signature of the mayor and the city clerk, and shall be received for general ad valorem taxes of the city.

SEC. 6. Said bonds shall be negotiated and sold by the mayor

and finance committee of the city as the same may be required for general purposes, but in no case shall they be sold at a greater discount than five per cent., and the proceeds thereof shall be placed in the treasury of the city to the credit of the general fund.

SEC. 7. That there be, and is hereby, appropriated out of the general ad valorem tax of the city one-eighth of one per cent., or so much thereof as may be necessary, on the assessed value of the taxable property of the city as a special interest and sinking fund with which to pay the interest on said bonds and liquidate the same, and said fund shall be kept separate from the other funds of the city and shall be used for no other purpose.

SEC. 8. That this ordinance go into effect and have force
27 from and after its passage.

Approved June 7th, 1879.

M. P. KERR, *Mayor.*

Attest:

C. H. CARLISLE, *Secretary.*

I certify the above to be a true and correct copy.

H. C. M'INTYRE, JR., *City Clerk.*

Brenham, Texas, Sept. 8th, 1886.

(Indorsed:) No. 2092. The German-American Bank *vs.* The City of Brenham. Plaintiff's first supplemental petition. Filed April 24th, 1888. D. H. Hart, clerk.

*Defendant's First Supplemental Answer. Filed April* 24, 1888.

In the United States Circuit Court, at Austin.

THE GERMAN-AMERICAN BANK *vs.* THE CITY OF BRENHAM. } No. 2092.

Comes now defendant in the above-entitled cause, by attorney, and, without waiving its plea in abatement and to the jurisdiction, heretofore filed, but still insisting on the same, files, with leave of the court first had and obtained, its first supplemental answer in in reply to first supplemental petition of plaintiff.

Demurring to said first supplemental petition, defendant says the same is insufficient in law for the following reasons:

1. The allegations of said first supplemental petition fail to show any authority in defendant to issue the bonds mentioned and the coupons sued upon.

28 2. There is an absence of averments showing the specific purpose for which said bonds and coupons were issued.

3. It appears from the allegations thereof, considered in connection with said ordinance of June 7th, 1879—

1. That neither defendant nor its officers had authority to issue bonds redeemable in ten years.

2. That said ordinance is in contravention of the constitution of the State in permitting the coupons attached to said bonds to be receivable in payment of taxes.

3. Said ordinance is in violation of defendant's charter and the laws of the State, in that it authorizes the signatures of the mayor and the secretary to be printed to said coupons.

Wherefore defendant prays judgment of the court.

MAXEY & FISHER &
PEELER & PEELER,
*Att'ys for Def'd't.*

Defendant specially excepts to the following parts of said supplemental petition:

1. To the 4th and 5th clauses thereof, because the law charges plaintiff and Mensing Bros. & Co. with notice of the provisions of the ordinance which authorizes the issuance of the bonds and coupons mentioned, and notice otherwise becomes an immaterial inquiry.

2. To the 8th clause thereof, because neither the payment of interest on the bonds nor the publication of financial statements by the officers or agents of defendant will validate municipal bonds which were illegal and void in their inception.

29 Wherefore defendant prays judgment of the court.

MAXEY & FISHER &
PEELER & PEELER,
*Attorneys for Defendant.*

Further answering, defendant denies the allegations in said first supplemental petition and requires proof thereof.

MAXEY & FISHER &
PEELER & PEELER,
*Attorneys for Defendant.*

(Indorsed:) 2092. German-American Bank *vs.* City of Brenham. Defendant's first supplemental answer. Filed April 24th, 1888. D. H. Hart, clerk.

*Agreement as to Testimony. Filed April 24th*, 1888.

United States Circuit Court, at Austin.

GERMAN-AMERICAN BANK *vs.* THE CITY OF BRENHAM.

It is agreed by the parties in the above-entitled cause as follows:

1. That the city of Brenham was incorporated by an act of the Legislature of the State of Texas February 4th, 1873; that at the date of its incorporation and of the passage of the ordinance, as stated in the pleadings in this case, the city of Brenham had a population of over 4,000 and less than 10,000 inhabitants.

2. On the 28th of March, 1881, Thomas Dwyer instituted a suit

against John W. Hackworth, assessor and collector of taxes
30 for the city of Brenham, to enjoin the collection of certain taxes, including as a part thereof one-eighth of one per cent. to pay interest and provide a sinking fund on the bonds of said city; that the bonds referred to in said suit are the identical bonds mentioned in the pleadings in this case, and it is agreed that the said case is reported as the case of Dwyer *vs.* Hackworth, 57 Tex., 245 *et seq.:* Provided, That this agreement shall not relieve the plaintiff from the necessity of introducing one of said bonds and all the coupons sued on in evidence on the trial of this cause.

3. It is agreed that the coupons sued on were presented to the proper authorities of the city of Brenham for payment at the proper time, and before the institution of this suit, and that payment thereof was then and there refused.

4. It is agreed that either party may introduce in evidence printed or certified copies of the charter, ordinances, resolutions, and proceedings of the city of Brenham, and the original minutes, and also tax-rolls of the assessor of taxes, if the originals of the same would be competent evidence and admissible as such.

DAVIS & DAVIDSON &
SAYLES & SAYLES,
*Attorneys for Plaintiff.*
MAXEY & FISHER &
PEELER & PEELER
*Attorneys for Defendant.*

(Indorsed:) Bank *vs.* Brenham. Filed April 24th, 1888. D. H. Hart, clerk.

31 *Charge of the Court on Plea in Abatement.*

THE GERMAN-AMERICAN BANK
*vs.*
THE CITY OF BRENHAM. } No. 2002.

Charge on plea in abatement submitted to the jury.

The defendant in his plea in abatement sets up that the plaintiff does not own or hold the bonds in such a way as to entitle him to sue in this court.

This plea presents an issue of fact which you are to determine. I charge you that the bonds and coupons in question are on their face commercial paper. The holding of such a paper, the employment of counsel to sue on these coupons by the bank, the failure of defendant to suggest or show that any one else is the owner of the coupons makes a *prima facie* case in favor of plaintiff.

If you find that Mensing was the purchaser and owner of the coupons, and that he pledged them to secure a loan made to him by the bank, and that in fact Mensing no longer claims or owns the coupons, you will find for the plaintiff. The failure to suggest that any one else owned the bonds or coupons or to name any one else as their owner is a strong circumstance in favor of the plaintiff.

32 *Charge to the Jury. Filed Apr. 26th,* 1888.

In U. S. Circuit Court, at Austin. April Term, 1888.

GERMAN-AMERICAN BANK *vs.* THE CITY OF BRENHAM.

Sayles & Davidson, attorneys for plaintiff.
Maxey & Fisher, attorneys for defendant.

Charge to jury. Filed April 26, 1888.

Bonds to the amount of $15,000.00, with interest coupons attached, were issued in 1879 by the defendant city, then operating under the charter of 1873. In that charter section 2 says: "That the city council shall have power and authority to borrow money for general purposes, not exceeding $15,000, fifteen thousand dollars, on the credit of the city."

The constitution of the State, 1876, allows such cities as Brenham to "collect an annual tax to defray the expenses of their local government, not to exceed for any year one-fourth of one per cent."

The power in the city to borrow money carries with it the authority to issue the bonds in this case. It may be that the limitation of the power to tax beyond ¼ one per cent. impairs the ability of the defendant to pay the bonds and coupons, but I do not think it denies the capacity of the corporation in 1879 to issue the bonds as commercial paper and bind the constituency to the payment thereof. Hence you will begin your consideration of the issuable facts with the fixed opinion that the city must pay the coupons now sued on in full, unless you should find adversely to plaintiff

33 on the single issue I shall directly present to you. If you find adversely to the plaintiff on that issue recovery can be had for only a part of the coupons sued on.

Before stating that issue let us sum up some of the matters of fact that are not disputed. Such evidence shows that the city, under the charter of 1873, issued by ordinance, in 1879, the bonds the coupons on which this suit is brought; that the city in pursuance of ordinances sold the bonds, and that — of the proceeds of the sale were expended by the city council unlawfully—that is, in aid of a railway company; that Giddings bought $5,000 of the bonds in August, 1879, and that Mensing became the owner of the whole issue before March, 1883, the interest coupons having been paid up to that date; that while Mensing held and owned the coupons on the whole issue, three series of them amounting to 2,250, became due and were unpaid. These unpaid coupons were due as follows: M'ch, 1883, Sept., 1883, M'ch, 1884, and Mensing pledged them, after the last date, to the plaintiff to secure the payment of the loan made by the bank. The defendant, having shown that some of the coupons were past due before the bank became the holder of them, has offered evidence to show that Mensing was charged with knowledge of such facts attending the issue and sale of bonds and the unlawful purposes for which the money obtained from their sale was ex-

pended by the city council as should forbid the bank, to whom Mensing pledged the overdue coupons, to recover on the past-due coupons, amounting to $2,250.

Now, then, the single issue of fact which I shall present you
34 is, Does the evidence show that Mensing, who purchased the bonds before the series of coupons mentioned were past due, and in whose hands they had become due, knew at any time before the purchase of the coupons that the city council in causing the bonds to be issued ostensibly for the "general purposes," as is recited on the face of the bonds, really intended that the proceeds of the bonds should and would be used, not for "general purposes," but that the proceeds were to be expended and were expended in aid of a railway company? In considering this matter you must keep in mind that the acts or intentions of the city council, acting as an official body in the exercise of powers delegated to it, can be ascertained in but one way—that is, by a fair reading of the city ordinances. Such a reading of the ordinances relating to these bonds shows clearly that the bonds were issued for "general purposes," and you would be authorized, when considering the rights of an innocent purchaser, one purchasing before maturity and for value, to conclude that the corporation issued and intended to issue them for such purposes as are stated in the bonds. Such a conclusion would be entitled to the force of a legal presumption if the plaintiff and the pledgor, Mensing, had come into the ownership or the possession of the coupons before any of them were overdue. It being admitted that $2,250 of the coupons were overdue when they left the hands of Mensing and came to the German Bank, you are advised to put such a conclusion aside and examine all the evidence illustrating the issue I have presented.

You may inquire into the acts, sayings, purposes, or intentions of
35 any one or all of the several members of the city council as individuals for the purpose only of ascertaining whether or not Mensing had any understandings with them or any one of them to the effect that the corporation would issue the bonds ostensibly for a lawful purpose, but that in fact the money obtained from the sale of the bonds should or would be expended in aiding a railway company. You may inquire, too, whether Mensing at the time, before he bought the bonds and coupons, knew that the money coming from the sale of the bonds had been at any time expended by acts of the city council. If, upon considering such testimony, you should find that Mensing was charged with knowledge at any time before he purchased the bonds, then you will deny the plaintiff any recovery of the $2,250.00 in coupons which were overdue, but you will allow plaintiff the balance of his demands.

Your conclusion on that single issue will control your verdict.

By way of further defense the defendant contends that the city did not comply with that article of the constitution which provides that all cities before incurring a debt shall provide by ordinance for securing the payment of the interest thereon, and for a sinking fund to pay the principal, and therefore the plaintiff was charged with knowledge of their invalidity. Plaintiff relies on the following ordi-

nance to show compliance with the requirements of the constitution: * * *

"SEC. 7. That there be, and is hereby, appropriated out of the general ad valorem tax of the city one-eighth of one per cent., or so much thereof as may be necessary, on the assessed value of the taxable property of the city as a special interest and sinking fund with which to pay the interest on said bonds and liquidate
36 the same, and said fund shall be kept separate from the other funds of the city and shall be used for no other purpose.

"SEC. 8. That this ordinance go into effect and have force from and after its passage."

I charge you that the ordinance read for you, in connection with the other ordinances that I shall not read to you, shows a substantial and sufficient compliance with the law, and on this defense you will find for plaintiff.

ALECK BOARMAN, *Judge.*

(Indorsed:) No. 2092. German-American Bank *vs.* City of Brenham. Charge of court. Filed April 26, 1888. D. H. Hart, clerk.

*Verdict of Jury on Plea in Abatement. Filed April 30th,* 1888.

GERMAN-AMERICAN BANK *vs.* CITY OF BRENHAM.

AUSTIN, TEXAS, 25*th April,* 1888.

We, the jury, find for the plaintiff.

THOMAS BALL, *Foreman.*

(Indorsed:) 2092. German-American Bank *vs.* City of Brenham. Filed April 30th, 1888. D. H. Hart, clerk.

*Verdict of Jury on the Merits. Filed April 30th,* 1888.

We, the jury, find for the plaintiff the full amount claimed.

THOS. H. ESPY, *Foreman.*

Ap'l 26th, 1888.

Amount claimed, fifty-five hundred and ten & $\frac{10}{100}$ dollars ($5,510.10).

THOS. H. ESPY.

(Indorsed:) 2092. German-American Bank *vs.* The City of Brenham. Filed April 30th, 1888. D. H. Hart, clerk.

37 *Judgment.*

THE GERMAN-AMERICAN BANK *vs.* THE CITY OF BRENHAM. } No. 2092.

On this the 26th day of April, 1888, came on to be heard the

above-entitled cause, and, by leave of the court, the defendant filed its amended original answer and the plaintiff, by leave of the court, filed its first supplemental petition by way of replication and the defendant, by leave of the court, interposed thereto its supplemental answer; and thereupon came on to be heard and determined by court and jury defendant's plea in abatement and to the jurisdiction of the court, which, being presented to the jury upon the evidence and the charge of the court, the jury returned into court the following verdict: "We, the jury, find for the plaintiff;" and thereupon came on to be heard before the court the general demurrer and the special demurrer and exceptions interposed by defendant to plaintiff's original petition, which, being considered by the court, were by it overruled; to which ruling of the court the defendant then and there in open court excepted; and thereupon came on to be heard by the court plaintiff's general demurrer and special exceptions to defendant's pleadings, which, being considered by the court, were by it overruled; to which ruling of the court the plaintiff then and there in open court excepted; and thereupon the special exceptions and demurrers of defendant to plaintiff's first supplemental petition came on to be heard and were by the court overruled; to which ruling of the court the defendant then and there excepted;

38 and thereupon, the trial of the cause proceeding before the court and jury, the court and jury having heard all the pleadings, the evidence, and arguments of counsel, the jury, being duly charged by the court, retired to consider their verdict, and thereafter returned into court the following verdict: "We, the jury, find for the plaintiff the full amount claimed, fifty-five hundred and ten and $\frac{10}{100}$ dollars." It is therefore considered and adjudged by the court, and it is so ordered and adjudged, that the said plaintiff do have and recover of and from said defendant, The City of Brenham, the said sum of fifty-five hundred and ten and $\frac{10}{100}$ dollars, with interest from date, at eight per centum per annum, and all costs of suit, for which execution may issue.

*Bill of Exceptions No.* 1. *Filed April 27th*, 1888.

United States Circuit Court, at Austin. Adjourned Term, April, 1888.

THE GERMAN-AMERICAN BANK
*vs.*
THE CITY OF BRENHAM. } No. 2092.

Defendant's bill of exceptions No. 1.

Be it remembered that upon the trial of the above entitled and numbered cause the following proceedings were had therein:

The plaintiff having presented to the court its original petition, the defendant thereupon presented to the court for its action the following general demurrer thereto, contained in its amended original answer filed in this cause on the 24th day of April, 1888:

39 Demurring to the petition of plaintiff, defendant says that the same is insufficient in law, because—

1. It does not specify the purpose for which said bonds and coupons were issued; and

2. It does not appear therefrom that defendant was authorized by the constitution and laws of Texas to issue the alleged bonds and the interest-bearing coupons declared upon.

Which said demurrer, having been considered by the court, was by the court overruled; to which ruling of the court the defendant then and there in open court excepted, and now here tenders this its bill of exceptions and prays that the same, which has been submitted to counsel for plaintiff, may now here in open court be allowed and authenticated by the signature of the judge trying said cause, which is accordingly done, in open court, this 27th day of April, A. D. 1888.

ALECK BOARMAN, *Judge.*

(Endorsed:) No. 2092. The German-American Bank *vs.* The City of Brenham. Bill of exceptions No. 1. Filed April 27, 1888. D. H. Hart, clerk.

*Defendant's Bill of Exceptions No.* 2. *Filed April* 27*th,* 1888.

United States Circuit Court, at Austin. Adjourned Term, April, 1888.

THE GERMAN-AMERICAN BANK *vs.* THE CITY OF BRENHAM. } No. 2092.

Defendant's bill of exceptions No. 2.

Be it remembered that upon the trial of the above entitled and numbered cause the following proceedings were had therein:

40 The plaintiff having presented to the court its first supplemental petition, filed herein April 24, 1888, the defendant thereupon presented to the court for its action the following general demurrer and special exceptions thereto, contained in its first supplemental answer, filed herein on said 24th day of April, 1888:

Demurring to said first supplemental petition, defendant says the same is insufficient in law for the following reasons:

1. The allegations of said first supplemental petition fail to show any authority in defendant to issue the bonds mentioned and the coupons sued upon.

2. There is an absence of averments showing the specific purpose for which said bonds and coupons were issued.

3. It appears from the allegations thereof, considered in connection with said ordinance of June 7th, 1879—

1. That neither defendant nor its officers had authority to issue bonds redeemable in ten years.

2. That said ordinance is in contravention of the constitution of the State in permitting the coupons attached to said bonds to be receivable in payment of taxes.

3. Said ordinance is in violation of defendant's charter and the laws of the State, in that it authorizes the signatures of the mayor and secretary to be printed to said coupons.

Defendant specially excepts to the following part of said supplemental petition:

1. To the 4th and 5th clauses thereof, because the law
41 charges plaintiff and Mensing Bros. & Co. with notice of the provisions of the ordinance which authorized the issuance of the bonds and coupons mentioned, and notice otherwise becomes an immaterial inquiry.

2. To the 8th clause thereof, because neither the payment of interest on the bonds nor the publication of financial statements by the officers or agents of defendant will validate municipal bonds which were illegal and void in their inception.

Which said demurrer and special exceptions, having been considered by the court, were by the court overruled; to which ruling of the court the defendant then and there in open court excepted, and now here tenders this its bill of exceptions and prays the same, which has been submitted to counsel for plaintiff, may now here in open court be allowed and authenticated by the signature of the judge trying said cause, which is accordingly done, in open court, this 27th day of April, 1888.

ALECK BOARMAN, *Judge.*

(Indorsed:) No. 2092. The German-American Bank *vs.* The City of Brenham. Bill of exceptions No. 2. Filed April 27, 1888. D. H. Hart, clerk.

*Defendant's Bill of Exceptions No.* 3. *Filed April* 27, 1888.

United States Circuit Court, Adjourned Term, at Austin. April, 1888.

THE GERMAN-AMERICAN BANK *vs.* THE CITY OF BRENHAM. } No. 2092.

Be it remembered that on the trial of the above entitled and
42 numbered cause the following, among other, proceedings were had after the pleadings of both parties, plaintiff and defendant, had been read:

1. The plaintiff admitted that the city of Brenham has and has always had less than ten thousand inhabitants and over two thousand inhabitants.

2. It proved that said city acts and since 1873 has acted under a special charter granted it in that year, and that said charter contains, among others, the following provision, under which charter the power to issue the bonds hereinafter referred to is claimed:

"SECTION 2. That the city council shall have the power and authority to borrow, for general purposes, not exceeding fifteen thousand ($15,000) dollars on the credit of said city."

3. Plaintiff also put in evidence and made proof of the following ordinances of the city of Brenham:

"An ordinance to provide for the issue and sale of fifteen thousand dollars in coupon bonds of the city to borrow money for general purposes.

"Be it ordained by the city council of the city of Brenham:

"SEC. 1. That the mayor be, and is hereby, authorized and empowered to have printed coupon bonds of the city of Brenham to the amount of fifteen thousand dollars.

"SEC. 2. Said bonds shall be—three (3) of the denomination of one thousand (1,000) dollars, fourteen (14) of the denomination
43 of five hundred (500) dollars, twenty-five (25) of the denomination of one hundred (100) dollars, and fifty (50) of the denomination of fifty (50) dollars. They shall be made payable to bearer twenty years after date at the office of the treasurer of the city of Brenham, with interest from date until paid, at the rate of ten per cent. per annum, payable semi-annually, on the first days of September and March, at the office of the treasurer of the city of Brenham, but the city shall have the right to redeem said bonds at any time after five years from date.

"SEC. 3. Said bonds shall be dated and the interest begin to run on the first day of ——, A. D. 18—: Provided, That should any of said bonds be sold at a subsequent date the amount of interest then due shall be indorsed as a credit on the coupons first due.

"SEC. 4. Said bonds shall be signed by the mayor and countersigned by the city clerk, and the seal of the city shall be affixed, and they shall be numbered and registered as series 2, number —, giving the number of the bond issued, commencing with No. 1.

"SEC. 5. Coupons shall be attached to each of said bonds for each semi-annual installment of interest, which said coupons shall
44 have printed thereto the signature of the mayor and the city clerk, and shall be received for general ad valorem taxes of the city.

"SEC. 6. Said bonds shall be negotiated and sold by the mayor and finance committee of the city, as the same may be required, for general purposes, but in no case shall they be sold at a greater discount than five per cent., and the proceeds thereof shall be placed in the treasury of the city to the credit of the general fund.

"SEC. 7. That there be, and is hereby, appropriated out of the general ad valorem tax of the city one-eighth of one per cent., or so much thereof as may be necessary, on the assessed value of the taxable property of the city as a special interest and sinking fund with which to pay the interest on said bonds and liquidate the same, and said fund shall be kept separate from the other funds of the city and shall be used for no other purpose.

"SEC. 8. That this ordinance go into effect and have force from and after its passage.

"Approved June 7th, 1879.

"M. P. KERR, *Mayor.*

"Attest:

"C. H. CARLISLE, *Secretary.*"

"An ordinance to provide for the just and equal valuation of property for the assessment of taxes."

45 "Be it ordained by the city council of the city of Brenham:

"SEC. 1. It shall be the duty of the assessor and collector of taxes, as soon as his assessment is completed, to deliver his lists and books to the committee on assessments for their examination and revision.

"SEC. 2. It shall be the duty of the committee on assessments, as soon as they receive the assessment lists and books mentioned in the first section, to give notice of the time and place of their meeting by a notice published in the official paper of the city at least five (5) days before the time designated for their meeting.

"SEC. 3. It shall be the duty of the committee on assessments at such meeting to examine the lists of real and personal property delivered to them under the first section of this ordinance and of which the owners are known. They shall see that each and every person has rendered his property at a fair market value, as is contemplated by law, and shall have power to send for persons and papers and swear & qualify persons to testify to ascertain the value of said property. They shall carefully revise the lists of the property of each person so that the same shall be a true and correct list of the same, and shall fix a fair market value of all property on the list.

46 "SEC. 4. The committee on assessments may hold as many meetings as may be necessary for completion of their work, and it shall not be necessary to give public notice of any adjourned meeting. They shall have power to correct any errors in the listing or valuation of property at any time before the tax is paid on said property.

"SEC. 5. The assessor of taxes shall attend each meeting of the committee on assessments with his books and papers, and shall, under the direction of the committee, enter upon his assessment-roll lists and valuation of property as determined by the committee.

"SEC. 6. If any party rendering property for assessment is dissatisfied with the list and valuation made out by the assessor as directed in the previous section and does not agree to the same he may appeal to the board of appraisement by giving to the assessor a written notice of his intention to appeal within ten (10) days after his property is asssessed, as heretofore directed.

"SEC. 7. When an appeal is taken to the board of appraisement it shall be the duty of the assessor to deliver to said board a copy of the list and appraisement objected to, with all such documentary evidence as may have been submitted to the committee on assessment. The board of appraisement may have such ad-

47 ditional evidence touching the matter in controversy as may be offered. The decision of the board shall be final and the assessor shall correct his assessment-roll in accordance with their decision.

"SEC. 8. When any property has been listed by the assessor which has not been rendered or the owner of which is unknown, the com-

mittee on assessment shall appraise the value of the same; and it shall be the duty of said committee to carefully examine the list of assessment and cause assessor to add thereto all property which has not been rendered. The assessor shall enter upon his rolls all property and valuation as directed by the committee under this section.

"SEC. 9. This ordinance shall take effect and be in force from and after its passage.

" Approved June 7th, 1879.

"M. P. KERR, *Mayor.*

"Attest:

" C. H. CARLISLE, *Sec'y.*"

4. Plaintiff further proved the issuance by the city, July 31, 1879, (under the ordinance of June 7th, 1879, entitled "An ordinance to provide for the issue and sale of fifteen thousand dollars in coupon bonds of the city to borrow money for general purposes "), of coupon bonds to the amount of fifteen thousand dollars, all which bonds and coupons attached (except as to amounts and numbers) are alike and read thus:

(By agreement copy of bond with attached coupons is inserted. See next page.)

(Here follows copy of bond marked p. 48.)

49 5. Plaintiff also introduced in evidence the coupons sued upon by it and described in its petition, and proved that said coupons were the same as those described in said petition. It also proved that, June 12th, 1884, G. H. Mensing, of Mensing Bros. & Co., deposited with plaintiff bank, as collateral security for a loan of $10,000 made and future advances to be made by plaintiff to Mensing Bros. & Co., $10,000 of the bonds aforesaid, to wit, bonds Nos. 56 to 65, both inclusive, for $100 each; bonds Nos. 76 to 81, both inclusive, and bonds Nos. 84 to 89, inclusive, each bond calling for $500, and bonds Nos. 90 to 92, both inclusive, for $1,000 each, to all of which said bonds there were attached interest coupons from and including March 1, 1883. Mensing Bros. & Co. now owe plaintiff about $35,000.

Plaintiff further proved by G. H. Mensing that at the time aforesaid, June 12th, 1884, Mensing Bros. & Co., through him, deposited with plaintiff bank other coupons embraced in those in suit, which had been clipped by Mensing Bros. & Co. from each of the remaining $5,000 of said bonds deposited by Mensing Bros. & Co. with Ball, Hutchings & Co., of Galveston, and that of the coupons clipped as aforesaid from each of the said last-named $5,000 of bonds there were belonging to said bonds last aforesaid three overdue coupons at the time of deposit with plaintiff, to wit, the coupons due March, 1883, September, 1883, and March, 1884.

Plaintiff further proved that, September 4, 1879, Mensing bought from the defendant city $5,600 of said bonds at 95 cents on the dollar, and, August 10, 1880, that he bought of F. A. Engelke $2,150 of

bonds in exchange for other property, taken at 100 cents on
50 the dollar, and that January 17th, 1881, he bought of J. F. Conlay $2,050.00 of said bonds at 94½ cents on the dollar, and on March 4th, 1882, that he bought — C. H. Schweiss $800 *dollars* of said bonds at 75 cents on the dollar, and on September 5th, 1882, that he bought — Giddings & Giddings $5,000 of said bonds at 90 cents on the dollar.

Defendant thereupon proved—

1. That the annual current expenses of the city of Brenham for the year 1879, beginning April 1 of said year, exclusive of interest to accrue on the bonds issued July 31, 1879, and a sinking fund of two per cent., amounted to the sum of $4,097, in addition to which there was outstanding against the city an outstanding bonded indebtedness of $771.44. This $771.44 was paid by the defendant with proceeds of sale of bonds issued under bond ordinance June 7th, 1879. Defendant further proved that the income of said city for the year 1879 from all sources was by the city council estimated at $4,590. Defendant further proved that the annual interest on said bonds amounted to $1,500 and the 2% sinking fund to $300.00 additional. Defendant further proved that July 30th, 1879, before the issuance of said bonds, the valuation of property of the city of Brenham subject to municipal taxation was $1,050,000; that the ordinance of June 7th, 1879, under which said bonds were issued, appropriated out of the general ad valorem tax of the city one-eighth of 1% to pay the interest on the bonds and create a sinking fund; and, further, that one-eighth of 1% would yield $1,312.50.

2. Defendant also introduced in evidence the following proceedings of the city council of Brenham:

51 "Alderman Wilkins moved, seconded by Alderman Reichardt, that the city issue bonds to the amount of ($15,000.00) fifteen thousand dollars, or so much thereof as may be necessary, for the purpose of placing the fire department of the city in a more efficient condition by purchasing the necessary apparatus for the use of same and to purchase the necessary land to grant the right of way and depot grounds to the G., C. & S. F. R. R., and that the city attorney be directed to draft an ordinance to that effect.

"The motion was carried, all the aldermen voting in the affirmative except Alderman Amsler, who voted no.

"On motion of Alderman Wilkins, seconded by Alderman Reichardt, Messrs. D. A. Allen and M. Amsler were appointed a committee and requested to wait upon Messrs. D. C. Giddings, C. R. Breedlove, and B. H. Bassett to consult with them as to whether the city had authority to raise the assessment after the assessor had accepted the same from the property-owners."

3. Defendant then introduced in evidence an ordinance of the city providing for a more efficient organization of the fire department. The ordinance is as follows:

"An ordinance providing for the more efficient organization of the fire department of the city of Brenham.

52 "Be it ordained by the city council of the city of Brenham:

"SEC. 1. That the sum of three thousand (3,000) dollars be, and is hereby, appropriated for the use of the fire department out of any funds in the city treasury arising from the sale of bonds of the city authorized by an ordinance entitled 'An ordinance to provide for the issuance and sale of fifteen thousand ($15,000) dollars in coupon bonds of the city to borrow money for general purposes," approved June 7th, 1879, in the purchase of hose, the securing of a permanent supply of water in case of fires, paying any balance that may be due on the purchase of the fire steamer, and for such other purposes as will promote the efficiency of the fire department.

"SEC. 2. This ordinance shall take effect and be in force from and after its passage.

"Approved June 9th, 1879.

"M. P. KERR, *Mayor.*

"Attest:

"C. H. CARLISLE, *Secr'y.*"

4. Defendant next introduced an ordinance of the city providing for any deficiency in the general revenue of the city for the fiscal year beginning April 1, 1879. Said ordinance is as follows:

"An ordinance to provide for any deficiency in the general revenue of the city for the fiscal year commencing April 1, 1879.

53 "Be it ordained by the city council of the city of Brenham:

"SEC. 1. That the sum of two thousand ($2,000) dollars be, and is hereby, appropriated to cover any deficiency in the general revenue for the year commencing on the 1st day of April, 1879.

"SEC. 2. Should there not be in the treasury of the city at any time during the year commencing on the 1st day of April, 1879, funds sufficient to pay the interest and sinking fund — become due on the bonds issued by the city or to pay the current necessary expenses of the city government, the mayor is authorized to sell bonds of the city, not exceeding two thousand ($2,000.00) dollars in value, sufficient to meet such deficiency, and the funds arising from said sale shall be applied to discharge such deficiency.

"SEC. 3. This ordinance shall take effect and be in force from and after its passage.

"Approved June 9th, 1879.

"M. P. KERR, *Mayor.*

"Attest:

"C. H. CARLISLE, *Secretary.*"

5. Defendant also put in evidence the testimony of E. C. Abbott, of Thomas Dwyer, of —— Wilkins, of —— Amsler, and of said G. H. Mensing, tending to prove that said G. H. Mensing, of the firm

of Mensing Bros. & Co., through whom plaintiff claims, had
54 notice of all the foregoing facts at and prior to the purchase by him or by said firm of any of said bonds; and further tending to prove that, prior to and at the time of the acquisition of said bonds and coupons by G. H. Mensing or by his firm, he knew that the bonds, afterwards deposited by Mensing Bros. & Co. with plaintiff, were not in fact issued for "general purposes" of municipal government, but were issued in aid of the Gulf, Colorado and Santa Fé Railroad Company, and that the ordinance of June 7th, 1879, under which they were issued, was passed with the view of enabling the city of Brenham, by the sale of bonds, to purchase for said Gulf, Colorado and Santa Fé Railroad Company in and through said city depot grounds and right of way.

6. The defendant next propounded in evidence the following ordinance of the city of Brenham:

"An ordinance designating the line for the Gulf, Colorado and Santa Fé Railroad Company through the city and granting the right of way to said road.

"Be it ordained by the city council of the city of Brenham:

"SEC. 1. That the following land be, and is hereby, designated for the line of the Gulf, Colorado and Santa Fé Railroad through the city, to wit: Beginning at the southern boundary line of the corporation, thence to Key street, intersecting the same south of Judge McFarland's residence, as near as practicable to said southern boundary line; thence with said Key street to the southwest corner of lot No. 3, in block No. 7, in Key's addition to the city of
55 Brenham; thence by the most practicable route to West street between O. Crozier's and W. B. Wilson's residence; thence with West street to the northern boundary of the city.

"SEC. 2. The right of way through the city is hereby given to the Gulf, Colorado and Santa Fé Railroad Company, said right of way to be as wide as necessary for the proper construction of said road.

"SEC. 3. The committee, composed of members of the council and citizens heretofore appointed by the city council, are hereby authorized and instructed to purchase the necessary property for depot grounds for said railroad company in the city, and such other property along the line of said railroad through the city as may be necessary for right of way.

"SEC. 4. Authority is hereby given to said railroad company to condemn such property along said line as may be necessary for said right of way in all cases where the owners of property and said committee cannot agree upon a price for said property.

"SEC. 5. Said committee shall take all titles and have deeds executed to the city of Brenham, and shall report all purchases made by them and turn over all title papers to the city council.

"SEC. 6. The sum of ten thousand ($10,000) dollars, or so
56 much thereof as may be necessary, is hereby appropriated for the purchase of said right of way and depot grounds, and the

mayor and secretary shall draw a warrant therefor in favor of the chairman of said committee whenever requested to do so.

"Approved June 26, 1879.

"M. P. KERR, *Mayor.*

"Attest:

"C. H. CARLISLE, *Secretary.*"

7. Defendant next introduced the following proceedings of the city council:

"COUNCIL HALL, BRENHAM, *July 24th*, 1879.

"Council met pursuant to a call of the mayor.

"At the roll-call the following members were present: His honor, M. P. Kerr, mayor; Aldermen J. A. Wilkins, D. A. Allen, E. Reichardt, and M. Amsler.

"The mayor stated the object of the meeting, being to hear the report of the railroad committee. Col. D. C. Giddings, chairman of said committee, stated that the G., C. & S. F. R. R. Co. had selected Mr. B. Eldridge as their arbitrator, and that each property-owner along the line had selected arbitrators for themselves. The results of the arbitration were as follows:

"To J. B. Vanness was allowed $150.00 for the right of way, 75 feet wide, and the corner of which will be cut off, he to move his own fence. Arbitrators in this case, B. Eldridge, Wm. Axer, and Chas. Asbeck.

"To Miller & Perry was allowed $200.00 for the right of way
57 through their property, 100 feet wide. Arbitrators in this case, B. Eldridge and Wm. Axer.

"To Chas. Asbeck was allowed $100.00 for the right of way through his property, 100 feet wide. Arbitrators in the case, B. Eldridge and Wm. Axer.

"To Ambrose Petty was allowed $250.00 for the right of way through his property, 75 feet wide, and corner of lot. Arbitrators in the case, B. Eldridge and Wm. Axer.

"To William A. Wood was allowed $600.00 for the right of way through both of his lots, 75 feet wide. Arbitrators in the case, B. Eldridge, E. F. Ewing, and John Randle.

"To I. B. M'Farland was allowed $1,200.00 for right of way through his property, 50 feet wide. Arbitrators in the case, B. Eldridge, E. F. Ewing, and John A. Randle.

"To H. L. M'Clung was allowed $1,000.00 for right of way through his property, 55 feet wide. Arbitrators in the case, B. Eldridge, E. Ross, and R. Hoffman.

"To James F. Estes was allowed $1,000.00 for his entire lot and improvements. Arbitrators in the case, B. Eldridge, P. W. Conell, and C. M. Campbell.

"To Mrs. Barnett was allowed $800.00 for the right of way through her property, 50 feet wide. Arbitrators in the case, B. Eldridge, J. E. Shepard, and C. M. Campbell.

58 "To. J. N. Brown nothing was allowed, he agreeing to give the road-bed. Arbitrators in the case, B. Eldridge and Wm. Axer.

"To J. L. Moore was allowed $1,500.00 for the right of way through his property, 50 feet wide. Arbitrators in the case, B. Eldridge, Dr. T. O. Hines, and C. M. Campbell.

"Col. Giddings reported for the committee that they had agreed to settle without arbitration with the following parties for the following amounts, to wit: To M. M. Baine allowed $350.00 for 50 feet off the northwest corner of his lot, parallel with the railroad.

"To Alex. Simon was allowed $1,250.00 for all of his lot, being about one acre of ground, the same to be designated as a freight depot.

"To P. H. Swearingen was allowed $1,300.00 for all of his lot, he retaining the privilege of removing the improvements.

"To T. A. Low was allowed $3,500.00 for 100 by 200 feet and all improvements.

"To O. Crozier was allowed $1,250.00 for right of way through his property, 25 feet west of the center of the track and all east of the track.

"The following case was arbitrated:

"To Higgins' heirs was allowed $35.00 per acre for every acre of land that the railroad may need in passing through the tract. Arbitrators in the case, B. Eldridge and C. P. Cillough.

"The following resolution, offered by Alderman E. Reichardt, was adopted:

59 "Resolved, That if the Gulf, Colorado & Santa Fé Railroad Company will advance the amount, without interest, which will be sufficient to make up the deficiency in securing the right of way through the city of Brenham and to purchase necessary depot grounds within said city for said railroad that the city of Brenham will agree to keep open account with said railroad company and give said Co. credit for all municipal taxes as the same accrues until said amount so advanced is cancelled.

"There being no further business, the council then adjourned.

"M. P. KERR, *Mayor.*

"DAN. P. McINTYRE,
"*Sec'y pro Tem.*"

8. Defendant further proved that August 18th, 1879, the following proceedings were had by the city council:

"The mayor reported city bonds sold as follows:

"To Messrs. Giddings & Giddings, Brenham, Texas:

| | | | |
|---|---|---|---|
| Bond No. 90—amount, | $1,000; | sold at 95c.; am't realized-- | $950 00 |
| Bond No. 91—amount, | 1,000; | sold at 95c.; am't realized-- | 950 00 |
| Bond No. 76—amount, | 500; | sold at 95c.; am't realized-- | 475 00 |
| Bond No. 77—amount, | 500; | sold at 95c.; am't realized-- | 475 00 |
| Bond No. 78—amount, | 500; | sold at 95c.; am't realized-- | 475 00 |
| Bond No. 79—amount, | 500; | sold at 95c.; am't realized-- | 475 00 |
| Bond No. 80—amount, | 500; | sold at 96c.; am't realized-- | 475 00 |
| Bond No. 81—amount, | 500; | sold at 95c.; am't realized-- | 475 00 |
| Total sold G. & G-- | $5,000 | Total am't realized----- | $4,750 00 |

To G. H. Mensing, Galveston, Texas:

60

| | | | |
|---|---|---|---|
| Bond No. 56—amount, | $100; | sold at 95c.; am't realized-- | $95 00 |
| Bond No. 57—amount, | 100; | sold at 95c.; am't realized-- | 95 00 |
| Bond No. 58—amount, | 100; | sold at 95c.; am't realized-- | 95 00 |
| Bond No. 59—amount, | 100; | sold at 95c; am't realized-- | 95 00 |
| Bond No. 60—amount, | 100; | sold at 95c.; am't realized-- | 95 00 |
| Bond No. 61—amount, | 100; | sold at 95c.; am't realized-- | 95 00 |
| Bond No. 62—amount, | 100; | sold at 95c.; am't realized-- | 95 00 |
| Bond No. 63—amount, | 100; | sold at 95c.; am't realized-- | 95 00 |
| Bond No. 64—amount, | 100; | sold at 95c.; am't realized-- | 95 00 |
| Bond No. 65—amount, | 100; | sold at 95c.; am't realized-- | 95 00 |
| Bond No. 84—amount, | 500; | sold at 95c.; am't realized-- | 475 00 |
| Bond No. 85—amount, | 500; | sold at 95c.; am't realized-- | 475 00 |
| Bond No. 86—amount, | 500; | sold at 95c.; am't realized-- | 475 00 |
| Bond No. 87—amount, | 500; | sold at 95c.; am't realized-- | 475 00 |
| Bond No. 88—amount, | 500; | sold at 95c.; am't realized-- | 475 00 |
| Bond No. 89—amount, | 500; | sold at 95c.; am't realized-- | 475 00 |
| Bond No. 92—amount, | 1,000; | sold at 95c.; am't realized-- | 950 00 |
| Total sold G. H. M., | $5,000 | Total am't realized---- | $4,750 00 |

To F. A. Engelke, Brenham, Texas:

| | | | |
|---|---|---|---|
| Bond No. 66—amount, | $100; | sold at 95c.; am't realized-- | 95 00 |
| Bond No. 67—amount, | 100; | sold at 95c.; am't realized-- | 95 00 |
| Bond No. 68—amount, | 100; | sold at 95c.; am't realized-- | 95 00 |
| Bond No. 69—amount, | 100; | sold at 95c.; am't realized-- | 95 00 |
| Bond No. 70—amount, | 100; | sold at 95c.; am't realized-- | 95 00 |
| Bond No. 71—amount, | 100; | sold at 95c.; am't realized-- | 95 00 |
| Bond No. 72—amount, | 100; | sold at 95c.; am't realized-- | 95 00 |
| Bond No. 73—amount, | 100; | sold at 95c.; am't realized-- | 95 00 |
| Am't forward-- | $800 | Am't forward---- | $760 00 |

61

| | | | |
|---|---|---|---|
| Bro't for'd---- | $800 | Bro't for'd ---- | $760 00 |
| Bond No. 74—amount, | 100; | sold at 95c.; am't realized-- | 95 00 |
| Bond No. 75—amount, | 100; | sold at 95c.; am't realized-- | 95 00 |
| Bond No. 82—amount, | 500; | sold at 95c.; am't realized-- | 475 00 |
| Bond No. 83—amount, | 500; | sold at 95c.; am't realized-- | 475 00 |
| Total sold to F. A. Engelke---- | $2,000 | Total amount realized from sale ---- | $1,900 00 |

| | | |
|---|---|---|
| Total am't of bonds sold---- | | $12,000 00 |
| " " realized from sale of same---- | $11,400 | |
| " " of discount on $12,000, at 5% ---- | 600 | |
| | | $12,000 00 |

Bonds still remaining in the hands of the mayor as follows:

| | |
|---|---|
| From No. one (1) to No. fifty (50), inclusive, for the amount of fifty ($50) dollars each | $2,500 |
| No. fifty-one (51) to No. fifty-five (55), inclusive, for the amount of one hundred ($100) dollars each | 500 |
| Total | $3,000 |

Which have been deposited with Messrs. Giddings & Giddings for safe keeping, and whose receipt I now have for same.

Respectfully submitted for examination and approval.

M. P. KERR, *Mayor.*

The report of the mayor as above was examined, approved, and adopted.

On motion, the blank coupons No. 1, which had been cut from the bonds before selling, and which had been printed for the purpose of including interest to Sept. 1st, 1879, and which interest the city does not have to pay, owing to advancement made by
62 Messrs. Giddings & Giddings, were referred to the finance committee, and they were instructed to examine the same, and, if found correct, to destroy them."

9. Defendant also introduced in evidence the following ordinance of the city of Brenham:

"An ordinance to amend an ordinance entitled 'An ordinance designating the line of the Gulf, Colorado and Santa Fé railroad through the city and granting the right of way to said road,' approved June 26th, 1879.

"Be it ordained by the city council of the city of Brenham:

"SEC. 1. That an ordinance entitled 'An ordinance designating the line of the Gulf, Colorado and Santa Fé railroad through the city and granting the right of way to said road,' approved June 26th, 1879, be so amended *so* as to hereafter read as follows:

"SEC. 2. That the following line be, and the same is hereby, designated for the line of the Gulf, Colorado and Santa Fé railroad through the city of Brenham: Beginning at a point in the southern boundary line of the corporation of the city of Brenham within a tract of land of Mrs. Louisa Stone, thence through that portion of said tract which lies within the corporation of the city of Brenham; thence through J. B. Vanness' tract of land; thence through Miller & Perry's tract of land; thence through lot of Mrs. M. A. Day and Mollie Daffin; thence through James Smelser's lot; thence through Am-
63 brose Petty's lot; thence through James H. Simmons' lot, being part of block No. 1, in Wilkin's addition to the city of Brenham; thence through W. G. Wilkin's lot, also being a part of said block No. 1, said addition, crossing Jackson street; thence through W. A. Wood's two lots, one being lot No. 1, in block

No. 2, Wilkin's said addition, the other being lot No. 2, in block No. 11, in Key's first addition to the city of Brenham; thence through J. B. McFarland's lot, being lot No. 1, in block No. 11, in Key's first addition, crossing Fourth street; thence through H. L. McClung's lot, being lot No. 2, in block 10, in Key's first addition; thence through the S. E. corner of J. W. Bostick's lot, being lot No. 1, in block No. 10, in Key's first addition, crossing Key's street; thence through James Estes' lot, being lot 4, in block 6, in Key's first addition, crossing Third street; thence through Mrs. E. M. Barrett's two lots, being lots Nos. 3 and 4, in block 7, in Key's first addition; thence crossing the N. W. corner of J. N. Brown's lot, being lot No. 2, in block No. 7, in Key's first addition; thence through J. L. Moore's lot, being lot No. 1, block 7, in Key's first addition, crossing Second street; thence through C. F. Ross' lot, being lot No. 2, in block No. 8, in Key's first addition, crossing Day street; thence through M. M. Bain's lot, being lot No. 3, in block 1, in Key's first addition;
64 thence through A. Simon's lot, being lot No. 4, in block 1, in Key's first addition, which two last named, to wit, A. Simon's lot and M. M. Bain's lot, are also hereby designated as the grounds for the freight depot of said railroad company; thence crossing First street; thence through Louis Brown's lot; thence crossing Central railroad track; thence through P. H. Swearingen's lot; thence through lot known as the House property. The last two named lots, to wit, P. H. Swearingen's lot and the lot known as the House property, are also hereby designated as the ground for the passenger depot of said railroad company; thence crossing Peabody street; thence through T. A. Low's lot; thence through O. Crozier's lot, crossing Sandy street; thence through D. W. Bloombargh's lot, there intersecting what is known and recognized as West street, in the city of Brenham; thence with said street to Higgin's branch, the termination of said street, crossing said branch; thence through Higgin's farm, which is the northern boundary line of the corporation of the city of Brenham.

"SEC. 3. The said right of way through the city of Brenham is hereby granted to the Gulf, Colorado and Santa Fé Railroad Company, said right of way to be as wide as is necessary for the proper construction of said railroad.

"SEC. 4. The committee, composed of members of the city
65 council and cititizens heretofore appointed by the city council, are hereby authorized and instructed to purchase the necessary property for depot grounds for said railroad company in the city, and such other property along the line of said railroad through the city as may be necessary for right of way.

"SEC. 5. Authority is hereby given to said railroad company to condemn such property along said line as may be necessary for said right of way in all cases where owners of property and said committee cannot agree upon a price for said property.

"SEC. 6. Said committee shall take all titles and have deeds executed to the city of Brenham, and shall report all purchases made by them and turn over all title papers to the city council.

"SEC. 7. The sum of ten thousand ($10,000) dollars, or so much

thereof as may be necessary, is hereby appropriated for the purchase of said right of way and depot grounds, and the mayor and secretary shall draw a warrant therefor in favor of the chairman of said committee whenever requested to do so.

"SEC. 8. All ordinances and parts of ordinances in conflict with this ordinance be, and the same are hereby, repealed, and this ordinance shall take effect from and after the date of its passage.

"Approved September 17th, 1879.

"M. P. KERR, *Mayor.*

"Attest:

C. H. CARLISLE, *Secretary.*"

66 .10. It was also proved that $3,000 of the bonds issued as aforesaid by the city of Brenham were used by the city for fire department purposes.

11. Defendant further proved that depot grounds in and right of way through the city of Brenham were bought for the Gulf, Colorado and Santa Fé Railroad Company with money realized from the sale of bonds issued under the ordinance of June 7th, 1879.

12. Defendant further proved that G. H. Mensing knew of the suit of Dwyer *v.* Hackworth, reported in the 57 Texas Reports, at the date of its institution, in March, 1881, and that he then first learned of trouble about the bonds. Defendant further proved that June 11th, 1882, said G. H. Mensing read the following syllabus of the opinion rendered by the supreme court of Texas in said suit:

"The Higher Courts.

"*Synopsis of the Opinions of the Appellate Courts.*

"Austin. Term, 1882, June.

"Reported by David H. Hewlett, of the Austin bar.

"Supreme Court.

"DWYER *vs.* HACKWORTH.

"From Washington county.

"The city of B. having assumed control of her public schools, the council in 1880 had authority to submit to a vote of the property tax-payers the proposition to raise, by taxation, such an amount in addition to that derived from the State as would be necessary for the conduct of the free schools for ten months, not to exceed one-half of 1 per cent. The result of said election being duly canvassed and declared and no proceeding having been instituted to contest the election, it is not competent to
67 have said result inquired into in this suit. The city council, by virtue of the affirmative vote of the tax-payers, were authorized to levy a tax not to exceed one-half of one per cent., and the discretion of the council in fixing such necessary amount will not

be revised. Under the assumed control of the public schools, public school-houses within the city limits became public buildings, and a tax of one-quarter of one per cent. for their erection is valid. The charter authorizing the borrowing of money, which was done by the issue of bonds, the validity of a tax to pay interest thereon is not affected by a subsequent appropriation to an unauthorized purpose. The charter provides that whenever the property-owners and assessor could not agree on the valuation of the property to be assessed such valuation should be fixed by the committee on assessment. After the property-owner in this case had rendered and the assessor had accepted the valuation, this committee, without the knowledge or consent of the tax-payer, increased the valuation: Held, that this action of the committee was illegal and void.

"Gould, C. J."

Defendant proved that G. H. Mensing, June 11, 1882, cut out said syallabus and preserved it.

13. Defendant further proved the existence of the following paragraph, contained in the agreed facts set out in the record of the case, decided at Austin, Texas, appealed from Brenham, Washington county, Texas, upon which the case of Dwyer *vs.* Hackworth was tried: "August 18th, 1879, the mayor of the city reported to the city council that $12,000.00 of the coupon bonds of the city, issued under the bond ordinance of June 7th, 1879, had been sold at a dis-
68 count of 5 %, the amount realized therefrom being $11,400.00, and that there remained on hand unsold $3,000.00 of the bonds issued under said ordinance. The proceeds of $10,000.00 of the bonds so sold was applied, as directed in the ordinance of June 26th, to the purchase of the land in said city for the right of way and depot grounds of the Gulf, Colorado and Santa Fé Railroad Company on which the railroad and depot buildings of said company were constructed and built, and also to pay damages caused by construction of said railroad to the owners of property abutting on said right of way, assessed against said railroad company."

Defendant further proved that the bonds had never been registered by the comptroller, and that at the time plaintiff acquired the bonds to which the coupons were attached and the aforenamed clipped coupons three coupons belonging to each bond were past due. The defendant offered the above testimony in connection with that introduced by plaintiff for the following purposes:

1. To show that the bonds described in plaintiff's petition and the coupons in suit were issued for the real purpose of purchasing right of way and depot grounds for the Gulf, Colorado and Santa Fé Railroad Company in and through the city of Brenham.

2. To show that the resources of the city at the time of the passage of the bond ordinance of June 7th, 1879, and at date of issuance of the bonds, on the 31st day of July, 1879, were barely sufficient to provide for the current expenses of the city for the fiscal year
69 beginning April 1, 1879, and that such resources were wholly insufficient to meet such current expenses and provide for

the payment of interest on the bonds and to provide for a sinking fund to pay the principal, as required by law.

3. To show that said bonds had not been registered with the comptroller of the State, and that said officer had never indorsed on the same his certificate of registration.

4. To trace notice to said G. H. Mensing of the unlawful purpose for which the bonds and coupons were issued, and to show that plaintiff was not the owner of the same, but merely held the same in pledge to secure an indebtedness due by Mensing, and that plaintiff was not a *bona fide* holder; but, upon objection by plaintiff's counsel, the court only admitted the testimony for the purpose of showing how far it would affect Mensing with notice of the unlawful purpose for which the bonds and coupons were issued, and upon the question of notice to Mensing the court limited the right of defendant to assail the validity of the coupons to the *coupons* which were overdue at the time they were deposited with plaintiff, the court holding that, as to the coupons not due at the time they were received by plaintiff, Mensing's knowledge of the unlawful purpose of the bonds was immaterial and would not affect plaintiff's right to recover thereon. For all other purposes than that above mentioned the court excluded the testimony from the jury.

To which ruling of the court the defendant, by its counsel, then and there in open court excepted, and tenders this its bill of
70 exceptions, the same having been first submitted to counsel for plaintiff, and asks now here in open court that the same be allowed and authenticated by the signature of the judge trying said cause, which is accordingly done, in open court, this the 27th day of April, A. D. 1888.

ALECK BOARMAN, *Judge.*

(Indorsed:) No. 2092. The German-American Bank *vs.* The City of Brenham. Defendant's bill of exceptions No. 3. Filed April 27th, 1888. D. H. Hart, clerk.

*Defendant's Bill of Exceptions No.* 4. *Filed April* 27*th*, 1888.

United States Circuit Court, at Austin. Adjourned Term, April, 1888.

THE GERMAN-AMERICAN BANK *vs.* THE CITY OF BRENHAM. } No. 2092.

Be it remembered that upon the trial of the above-entitled cause the following proceedings were had:

After the pleadings of the parties were read and the testimony set forth in defendant's bill of exceptions No. 3 had been admitted in evidence for the purpose as held by the court, the plaintiff then offered in evidence testimony showing—

1. That all the coupons on said bonds up to and including September 1st, 1882, had been paid by defendant.

2. That on March 21st, 1884, defendant, through its finance com-

mittee, issued and published a financial statement of the city as follows:

"*City Financial Statement.*

71 "Special meeting of the city council, held March 21, 1884, for the purpose of receiving the annual statement of the financial committee.

"Officers present: J. A. Wilkins, mayor; Aldermen J. R. Williamson, C. C. Garrett, and L. S. Deckard.

"The financial committee presented the following annual statement:

"To the honorable mayor and board of aldermen of the city of Brenham:

"The finance committee beg leave to submit their annual statement of the receipts, expenditures, etc., for the municipal year ending Tuesday, April 1, 1884, and ask that the same be spread upon the minutes and published, as required by law.

"Under the head of 'receipts in general fund' will be found 'warrants outstanding,' $255.70; this embraces $250.00 issued for streets, which matures in five annual installments from May 1, 1884. There is also outstanding, maturing in eight annual installments from 1883, the sum of $1,165, issued for streets prior to May 15, 1883, and against the street fund proper there is $200.00, maturing in four payments, reported as warrants outstanding.

"There is $1,263.00 against 'building fund,' issued for school furniture, that is not due for twelve months.

"The committee have omitted from schedule of liabil- the amount ascertained to be due the Gulf, Colorado and Santa Fé Railroad Company by ordinance Febuary 28, 1881 (Min., p. 223), in accordance with the resolution of the council July 24, 1879 (Min., p. 60), to wit, $8,800.00, because the same is to be paid, without interest, from the taxes assessed against the said company, which amount
72 practically only to an exemption from general taxes. Said sum should be credited with taxes of 1881, $42.20; 1882, $55.35, and 1883, $61.99.

"J. R. WILLAIMSON,
"C. C. GARRETT,
"*Fin. Com.*

"Brenham, March 21, 1884.

"*General Fund.*

"Receipts:

| | |
|---|---|
| "To occupation tax | $4,264 90 |
| " " ad valorem tax | 4,742 18 |
| " " dog tax | 105 60 |
| " " vehicle tax | 192 00 |
| " " warrants outstanding | 255 70 |
| " " warrants between March 15 & May 1, 1883, regist'd | 302 43 |
| | $9,862 81 |

"Disbursements:

| | |
|---|---|
| "By deficit March 15, 1883 | $26 81 |
| " " salaries, officers | 1,122 18 |
| " " salaries, police | 1,884 01 |
| " " scavenger | 752 50 |
| " " fire department | 771 30 |
| " " incidentals | 1,066 29 |
| " " printing | 100 00 |
| " " streets | 490 00 |
| " " vehicle tax refunded | 99 00 |
| " " interest on bonds | 250 00 |
| " " G., C. & S. F. R'y Co. | 61 99 |
| " " commission, A. & C. assessment | 141 25 |
| " " error favor of A. & C. | 4 98 |
| " " old warrants paid | 876 62 |
| " " balance on hand | 2,215 88 |
| | $9,862 81 |

73 *"School Fund.*

"Receipts:

| | |
|---|---|
| "To cash on hand March 15, 1883 | $1,674 78 |
| " " ad valorem tax | 5,727 42 |
| " " poll tax | 397 48 |
| " " tuition | 718 06 |
| " " rent Wash. Co. school lands | 583 51 |
| " " J. W. Hackworth, injunction case | 88 18 |
| " " Bassett & Bassett, estimate cotton crop | 50 00 |
| " " State board education | 4,104 00 |
| | $13,343 43 |

"Disbursements:

| | |
|---|---|
| "By teachers' salaries | $8,127 50 |
| " " janitor and rent | 225 75 |
| " " sundries | 656 04 |
| " " lumber | 99 50 |
| " " insurance | 337 27 |
| " " com., A. & C., for assessment | 135 00 |
| " " error against A. & C. | 2 48 |
| " " error | 1 45 |
| " " cash on hand | 3,758 46 |
| | $13,343 43 |

"*Building Fund.*

"Receipts:

| | |
|---|---|
| "To cash on hand March 15, 1883 | $5,811 98 |
| " " ad valorem tax | 4,677 22 |
| " " J. W. Hackworth, injunction case | 44 09 |
| " " Germania Volksfest | 100 44 |
| " " warrants outstanding | 3,282 00 |
| " " error | 24 |
| | $13,915 97 |

74 "Disbursements:

| | |
|---|---|
| "By amount for school-house | $10,889 50 |
| " " school furniture | 1,263 00 |
| " " repairs | 165 76 |
| " " interest on warrants | 33 76 |
| " " commission, A. & C., for assessment | 102 94 |
| " " cash on hand | 1,461 01 |
| | $13,915 97 |

"*Special-Debt Fund.*

"Receipts:

| | |
|---|---|
| "To cash on hand March 15th, 1883 | 15 22 |
| " " ad valorem tax | 1,376 28 |
| | $1,391 50 |

"Disbursements:

| | |
|---|---|
| "By registered warrants paid | 812 99 |
| " " cash on hand | 578 51 |
| | $1,391 00 |

"(NOTE.—The above fund is for the payment of warrants issued prior to May 1, 1883, which are required to be registered and paid in the order of registration.)

"*Street Fund.*

"Receipts:

| | |
|---|---|
| "To cash on hand March 15th, 1883 | 47 59 |
| " " fines in mayor's court, Doran | 75 50 |
| " " fines in mayor's court, Harvin | 1,285 97 |
| " " vehicle license | 127 68 |
| " " warrants outstanding | 281 24 |
| | $1,817 98 |

75 "Disbursements:

| | |
|---|---|
| "By lumber | 720 48 |
| " " gas | 205 49 |
| " " sundries | 39 55 |
| " " streets | 380 00 |
| " " old warrants paid | 307 93 |
| " " cash on hand | 164 53 |
| | $1,817 98 |

"*Liabilities.*

| | |
|---|---|
| "Bonds of 1879, 5-20, 10's | $15,000 00 |
| "Accrued interest | 3,750 00 |
| "Registered warrants (general fund) | 2,470 00 |
| "Old unregistered warrants | 234 00 |
| "Warrants for streets—not due | 1,165 00 |
| "Warrants outstanding (general fund) | 255 70 |
| "Warrants outstanding (building) | 2,019 00 |
| "Warrants outstanding (furniture) | 1,263 00 |
| "Excess of assets | 4,700 92 |
| | $30,908 19 |

"*Assets.*

| | |
|---|---|
| "Delinquent tax, 1880–'1 | 469 33 |
| "Delinquent tax, 1882, general fund | 94 27 |
| "Delinquent tax, 1882, school fund | 94 27 |
| "Delinquent tax, 1882, building fund | 94 27 |
| "Delinquent tax, 1883, general fund | 632 65 |
| "Delinquent tax, 1883, school, ad val. | 798 98 |
| "Delinquent tax, 1883, school, poll | 91 13 |
| "Delinquent tax, 1883, building | 632 65 |
| "Delinquent tax, 1883, special debt | 255 20 |
| "School house and grounds | 15,000 00 |
| "City hall | 2,664 00 |
| "Forward | |
| 76 "Cisterns and well | 938 00 |
| "Two horses | 215 00 |
| "Carts, harness, and tools | 150 00 |
| "Lamps and posts | 600 00 |
| "Cash to credit school fund | 3,758 46 |
| "Cash to credit general fund | 2,215 88 |
| "Cash to credit building fund | 1,461 01 |
| "Cash to credit special-debt fund | 578 51 |
| "Cash to credit street fund | 164 53 |
| | $30,908 19 |

"Approved March 21, 1884.

"J. A. WILKINS,
"*Mayor of Brenham.*"

"On motion, the statement was received, approved, and ordered spread on the minutes and printed.

"There being no further business, the council adjourned.

"H. C. McINTYRE, *Sec.*"

3. That C. C. Garrett, city attorney, wrote a letter on April 21, 1884, to Henry Sayles, Esq., as follows:

"EXHIBIT D.

"C. C. Garret, law office.

"BRENHAM, TEXAS, *April* 21, 1884.

"Henry Sayles, Esq., Galveston.

"DEAR SIR: Yours 19th inst. received. The city administration, as at present constituted, recognizes the validity of the bonds and will do what it can to pay them.

"When I came into office as alderman, one year ago, no interest had been paid for two years and the finances of the city were
77 in a bad condition. We have retrieved the finances by cutting down salaries and registering old warrants. Under constitution as amended we levied a tax of 10c. to pay old indebtedness, but the amount was insufficient to pay off registered warrants. The accumulated interest on the bonds will come in next. In the meantime we will pay an amount equal to annual interest out of the general fund. We have paid our semi-annual installment, and in a few days will pay another. In our budget for 1884 we allow on general fund $1,800.00 for int. and sinking fund on bonds. We intend to pay the bonds. They are redeemable this year, and we will try to raise the money at a less per cent. and take them up. I think we can probably get it at six per cent. There will be a balance in the "debt fund" of this year after paying registered warrants, which we will apply to matured coupons.

"Yours very truly, C. C. GARRETT."

Defendant, by its counsel, at the time objected to the testimony upon the grounds: 1. That neither the acts of its officers or agents or of its common council were sufficient to estop defendant from setting up the invalidity of the bonds and coupons. 2. The city being without power to issue bonds and coupons, neither the subsequent action of the council nor the conduct nor action of the city officers would mount to a ratification of the illegal act in the issuance of the bonds and coupons, and hence the testimony became irrelevant and immaterial; but the court overruled tbe objections and admitted the testimony; to which ruling of the court the defendant then and there in open court excepted, and tenders
78 this its bill of exceptions, the same having been first submitted to counsel of plaintiff, and asks now, here in open court, that the same be allowed and authenticated by the signature of the judge trying said cause, which is accordingly done, in open court, this 27th day of April, A. D. 1888.

ALECK BOARMAN, *Judge.*

(Indorsed:) No. 2092. German-American Bank *vs.* The City of Brenham. Defendant's bill of exceptions No. 4. Filed April 27th, 1888. D. H. Hart, clerk.

*Defendant's Bill of Exceptions No. 5. Filed Ap'l 27, 1888.*

United States Circuit Court, Western District of Texas, at Austin.
Adjourned Term, Ap'l, 1888.

THE GERMAN-AMERICAN BANK *vs.* THE CITY OF BRENHAM.

Be it remembered that upon the trial of the above-entitled cause the following proceedings were had:

The court, after the evidence was submitted as ascertained and recited in defendant's bill of exceptions No. 3, among other things, charged the jury as follows:

"By way of further defense, the defendant contends that the city did not comply with that article of the constitution which provides that all cities before incurring a debt shall provide by ordinance for securing the payment of the interest thereon and for a sinking fund to pay the principal, and therefore the plaintiff was charged with knowledge of their invalidity.

79 "The plaintiff relies on the following ordinance to show compliance with the requirements of the constitution:

"'SEC. 7. That there be, and is hereby, appropriated out of the general ad valorem tax of the city one-eighth of one per cent., or so much thereof as may be necessary, on the assessed value of the taxable property of the city as a special interest and sinking fund with which to pay the interest on said bonds and liquidate the same, and said fund shall be kept separate from the other funds of the city and shall be used for no other purpose.

"'SEC. 8. That this ordinance go into effect and have force from and after its passage.'

"I charge you that the ordinance read to you, in connection with the other ordinances that I shall not read to you, shows a substantial and sufficient compliance with the law, and on this defense you will find for plaintiff."

Thereupon the defendant, by its counsel, at the time and before the jury retired, excepted in open court to the foregoing charge, on the ground that, in view of the evidence as recited in defendant's bill of exceptions No. 3, and in view of the constitutional provisions of Texas, it was contrary to law; and defendant, before the retirement of the jury, requested the court to give the following special instruction in charge to the jury:

*Fourth Special Charge Requested by Def'd't.*

80 "If from the evidence the jury believe that at the date of the issuance of the coupons in suit and the bonds to which they were attached the assessable property of the city of Brenham

was not sufficient in amount to enable the city by the imposition of lawful taxes to raise revenues sufficient to provide for its current expenses, and to further provide for the payment of interest on the bonds and for providing a sinking fund of at least two (2) per cent. to pay the bonds at maturity, then you are charged that the city has no power to issue the coupons in suit and the bonds to which they were attached, and in this event you will find for the defendant."

Which said special charge so requested by defendant the court refused to give; to which action of the court in giving said charge and refusing to give the special instruction requested by defendant the defendant then and there, in open court and before the jury retired, excepted, and tenders this its bill of exceptions, the same having been first submitted to counsel for plaintiff, and asks now, here in open court, that the same be allowed and authenticated by the signature of the judge trying said cause, which is accordingly done, in open court, this the 27th day of April, A. D. 1888.

ALECK BOARMAN, *Judge.*

(Indorsed:) No. 2902. German-American Bank *vs.* The City of Brenham. Defendant's bill of exceptions No. 5. Filed April 27th, 1888. D. H. Hart, clerk.

81 *Defendant's Bill of Exceptions No.* 6. *Filed April 27th,* 1888.

United States Circuit Court, at Austin. Adjourned Term, Ap'l, 1888.

THE GERMAN-AMERICAN BANK *vs.* THE CITY OF BRENHAM. } No. 2092.

Be it remembered that upon the trial of the above entitled and numbered cause, the pleadings of the parties, plaintiff and defendant, being as set out elsewhere in the record and the evidence being as recited in defendant's bill of exceptions No. 3, the court thereupon instructed the jury, among other things, in substance, as follows: That the ordinance under which the bonds were issued disclosed that they were to be issued and sold for a lawful purpose, and the bonds issued thereunder and purchased by Mensing recited a lawful purpose and are valid bonds, unless the jury believe that they were actually issued and sold for an unlawful purpose, and that Mensing knew of or had knowledge of the unlawful purpose for which they were issued at the time he purchased them, and that the city having substantially made, by the ordinance, provisions for the interest and sinking fund, the fact that there was an insufficient amount provided by the ordinance would not invalidate the bonds.

To which charge of the court the defendant then and there, in open court, before the retirement of the jury, excepted, because the the same was contrary to law; and, in the same connection, with the view of correcting the above-assigned errors in the charge of the court and before the retirement of the jury, the defendant requested

82 the court to give, in charge to the jury, the following special instructions:

"*Special Charge No.* 1 *Asked by the Defendant.*

"If from the evidence the jury believe that at the time the plaintiff acquired the coupons upon which this suit is brought some of the coupons were past due, then you are instructed that the defendant may avail itself against plaintiff of any equities or defenses which would defeat a recovery thereon; and, in this connection, you are further instructed that if from the evidence you believe that the bonds with the coupons attached were, in fact, issued for the purpose of extending aid to the Gulf, Colorado and Santa Fé R. R. Co. by purchasing and donating to it the right of way and depot grounds through and in the city of Brenham, or if you believe from the evidence that the bonds to which the coupons in suit were attached were sold and the proceeds used in the purchase of right of way and depot grounds for said R. R. Co., then you will, as to such of the coupons as were past due at the time plaintiff acquired same, find for the defendant."

"*Special Charge No.* 2 *Asked by Defendant.*

"If from the evidence the jury believe that prior to acquisition by plaintiff from Mensing of the bonds and coupons testified to by J. H. Mensing and by the president and cashier of the plaintiff bank Mensing, prior to or at the time of his purchase or purchases, knew or was in possession of facts from which he might have known that the bonds were really issued in aid of the G., C. and S. F. R. R. Co. and for its benefit, or that the proceeds of the sale of said bonds were appropriated by the city to the purchase of depot grounds and right of way for said R. R. Co. and Mensing, with such knowledge
83 or means of knowledge, bought said bonds and subsequently transferred part of same to plaintiff for value, with overdue coupons attached, then you are instructed that as to all of the coupons attached to the bonds on which were the overdue coupons and as to the overdue coupons themselves the plaintiff is charged with notice of their invalidity and cannot recover."

*Special Charge No.* 3 *Asked by Defendant.*

"If from the evidence the jury believe that at the date of the issuance of the bonds to which the coupons in suit were attached the current expenses of the city of Brenham were equal to or in excess of the annual revenue accruing to it by taxation, then you are instructed that the issuance of said bonds was illegal and void, and you will return a verdict for the defendant."

But the court refused to give said special instructions or any of them; to which action of the court in charging as aforesaid and in refusing the aforesaid special instructions the defendant then and there, in open court and before the jury had retired, excepted, and tenders this its bill of exceptions, the same having been first submitted to counsel for plaintiff, and now here asks in open court that

the same be allowed and authenticated by the signature of the judge trying said cause, which is accordingly done, in open court, this 27th day of April, A. D. 1888.

ALECK BOARMAN, *Judge.*

84 (Indorsed:) No. 2092. The German-American Bank *vs.* The City of Brenham. Defendant's bill of exceptions No. 6. Filed April 27th, 1888. D. H. Hart, clerk.

*Defendant's Bill of Exceptions No. 7. Filed April 27th,* 1888.

The United States Circuit Court, Western District of Texas, at Austin. Adjourned Term, April, 1888.

THE GERMAN-AMERICAN BANK *vs.* THE CITY OF BRENHAM. } No. 2092.

Be it remembered that upon the trial of the above-entitled cause, the pleadings of the parties having been read and the evidence having been submitted, the court thereupon, among other things, instructed the jury as follows:

"Bonds to the amount of $15,000.00, with interest coupons attached, were issued in 1879 by the defendant city, then operating under the charter of 1873. In that charter section 2 says: 'That the city council shall have power and authority to borrow money for general purposes, not exceeding $15,000, fifteen thousand dollars, on the credit of the city.'

"The constitution of the State, 1876, allows such cities as Brenham to 'collect an annual tax to defray the expenses of their local government, not to exceed for any year one-fourth of one per cent.'

85 "The power in the city to borrow money carries with it the authority to issue bonds in this case. It may be that the limitation of the power to tax beyond one-fourth of one per cent. impairs the ability of the defendant to pay the bonds and coupons, but I do not think it denies the capacity of the corporation in 1879 to issue the bonds as commercial paper."

The defendant then and there, in open court, before the retirement of the jury, excepted to the charge above recited, upon the grounds—

1. That under the constitution of Texas the expense of carrying out the general governmental purposes of the defendant is to be defrayed by the levy of a tax and not by the issuance of bonds.

2. The bonds so issued by defendant are not clothed with the incidents of commercial paper, and defendant tenders this its bill of exceptions, the same having been first submitted to counsel for plaintiff, and now here asks in open court that the same be allowed and authenticated by the signature of the judge trying said cause, which is accordingly done, in open court, this the 27th day of April, A. D. 1888.

ALECK BOARMAN, *Judge.*

(Indorsed:) No. 2092. The German-American Bank *vs.* The City of Brenham. Defendant's bill of exceptions No. 7. Filed April 27th, 1888. D. H. Hart, clerk.

86 THE UNITED STATES OF AMERICA:

The President of the United States to the honorable judges of the circuit court of the United States for the fifth circuit and western district of Texas, at Austin, in said district, Greeting:

Because in the records and proceedings and also in the rendition of the judgment of a plea which is in said circuit court, before you, between the German-American Bank, plaintiff, and The City of Brenham, defendant, manifest errors hath happened to the said named defendant, who is plaintiff in error herein, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October next, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Samuel F. Miller, associate justice of the Supreme Court of the United States, this the 13th day of June, in the year of our Lord one thousand eight hundred and eighty-eight.

[The Seal of the U. S. Circuit Court, Western Dist. Texas, Austin.]

D. H. HART,
*Clerk of the Circuit Court of the United States for the Fifth Circuit and Western District of Texas, at Austin.*

Allowed by—
DON A. PARDEE,
*U. S. Circuit Judge.*

[Endorsed:] #2092. (11.) German-American Bank *vs.* City of Brenham. Writ of error. Issued June 13, 1888. D. H. Hart, clerk. Filed July 5th, 1888. D. H. Hart, clerk.

87 *Copy of Writ of Error Lodged for Defendant in Error. Filed July 5th*, 1888.

THE UNITED STATES OF AMERICA:

The President of the United States to the honorable judges of the circuit court of the United States for the fifth circuit and western district of Texas, at Austin, in said district, Greeting:

Because in the records and proceedings and also in the rendition of the judgment of a plea which is in said circuit court, before you, be-

tween The German-American Bank, plaintiff, and The City of Brenham, defendant, manifest errors hath happened to the said named defendant, who is plaintiff in error herein, and, being willing that error, if any hath happened, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October next, in the said Supreme Court to be then and there held, that, the records and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Samuel F. Miller, associate justice
88 of the Supreme Court of the United States, this the 13th day of June, in the year of our Lord one thousand eight hundred and eighty-eight.

[SEAL.] D. H. HART,
*Clerk of the Circuit Court of the United States for the Fifth Circuit and Western District of Texas, at Austin.*

Allowed by—
DON A. PARDEE,
*U. S. Circuit Judge.*

(Indorsed:) No. 2092. The German-American Bank *vs.* City of Brenham. Writ of error. Issued June 13th, 1888. D. H. Hart, clerk. Filed July 5th, 1888. D. H. Hart, clerk.

89 THE UNITED STATES OF AMERICA:

The German-American Bank, defendant in error, or to Messrs. Davis & Davidson, its attorneys of record:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the fifth circuit and western district of Texas, at Austin, wherein The City of Brenham is plaintiff in error and The German-American Bank is defendant in error, to show cause, if any there be, why the judgment rendered against the plaintiff in error, as in said writ of error mentioned, should not be corrected and speedy justice should not be done to the parties in that behalf.

Witness the Honorable Samuel F. Miller, associate justice of the Supreme Court of the United States, this the 16th day of June, in the year of our Lord one thousand eight hundred and eighty-eight.

DON A. PARDEE, *U. S. Judge.*

Test with seal of the circuit court of the United States for the fifth circuit and western district of Texas, at Austin, this the 29 day of June, A. D. 1888.

[The Seal of the U. S. Circuit Court, Western Dist. Texas, Austin.]

D. H. HART,
*Clerk United States Circuit Court, at Austin.*

89½ [Endorsed:] # 2092. (13.) German-American Bank *v.* City of Brenham. Citation in error. Issued June 29, 1888. D. H. Hart, clerk. Filed July 5th, 1888. Copy and time waived and service accepted of the within citation in error. July 2, '88. Davis & Davidson, att'ys for German-American Bank.

90 *Bond for Costs. Filed June 29th*, 1888.

In the United States Circuit Court, Fifth Circuit, Western District of Texas, at Austin.

THE GERMAN-AMERICAN BANK
*vs.*
THE CITY OF BRENHAM. } No. 2092.

Know all men by these presents that we, The City of Brenham and R. Hoffmann, Wm. Zeiss, and F. Kreutzlin, are held and firmly bound unto The German-American Bank, defendant in error in the above-entitled cause, in the full and just sum of one thousand ($1,000) dollars; to which payment, well and truly to be made to the said German-American Bank, we bind ourselves, our successors, heirs, executors, and administrators, jointly and severally, firmly by these presents.

In testimony whereof this instrument is executed in behalf of said plaintiff in error, The City of Brenham, by and through its mayor, J. A. Wilkins, and attested by its secretary, H. C. McIntyre, Jr., who hereto affixes its corporate seal, and the said R. Hoffmann, Wm. Zeiss, and F. Kreutzlin hereto sign their names and affix their seals (using scrawls) this the 16th day of June, A. D. 1888.

Whereas lately, at a circuit court of the United States for the fifth circuit, western district of Texas, holding sessions at Austin, in a suit between the said German-American Bank, a corporation organized and existing under and by virtue of the laws of the State of New York, plaintiff, and the said City of Brenham, a municipal corporation organized and chartered under and by laws of the State of Texas, defendant, a judgment was rendered on, to wit, the 26th day of April, A. D. 1888, in favor of said plaintiff, the said
91 German-American Bank, and against the said defendant, The City of Brenham, for the sum of fifty-five hundred and ten and $\frac{10}{100}$ ($5,510.10) dollars, with interest from date thereof at eight (8) per cent. per annum, and all costs of suit; and the said defendant, The City of Brenham, having prosecuted a writ of error to the Supreme Court of the United States to be holden at Washington on the second Monday of October next:

Now, the condition of the above obligation is such that if the said City of Brenham, plaintiff in error, shall prosecute its writ of error to effect and answer all costs if it shall fail to make good its plea, then this obligation shall be void; otherwise to remain in full force and effect.

J. A. WILKINS, *Mayor.*

Attest:
H. C. McINTYRE, *Secretary.*
June 16, 1888.

R. HOFFMANN. [SEAL.]
W. ZEISS. [SEAL.]
F. KREUTZLIN. [SEAL.]

Approved:
DON A. PARDEE,
*U. S. Circuit Judge.*

THE STATE OF TEXAS, *County of Washington:*

Before me, C. F. Herbst, clerk of the district court within and for said county and State, on this day personally appeared R. Hoffmann, Wm. Zeiss, and F. Kreutzlin, who, being solemnly sworn, deposes, each for himself, and says that he is solvent and has property subject to execution largely in excess of one thousand dollars, and that he signed as one of the sureties the foregoing writ-
92 of-error cost bond executed by the City of Brenham in the suit of The German-American Bank *vs.* The City of Brenham.

R. HOFFMANN.
W. ZEISS.
F. KREUTZLIN.

Sworn to and subscribed before me this the 16th day of June, A. D. 1888.

[SEAL.]

C. F. HERBST,
*Dist. Cl'k W. Co., Tex.*

THE STATE OF TEXAS, *County of Washington:*

I, C. F. Herbst, clerk of the district court of Washington county, Texas, do hereby certify that each of the sureties on the above and foregoing writ-of-error bond, to wit, R. Hoffmann, Wm. Ziess, and F. Kreutzlin, is solvent, and that each of said sureties own property in excess of legal exemptions to an amount equal to one thousand dollars; and I further certify that if said bond were presented to me for approval in a suit pending in said district court I would approve the same.

Witness my hand and seal — office this the 16th day of June, A. D. 1888.

[SEAL.]

C. F. HERBST,
*Clerk District Court, Washington County, Texas.*

(Indorsed:) No. 2092. German-American Bank *vs.* City of Brenham. Bond for costs. Filed June 29th, 1888. D. H. Hart, clerk.

93 *Bill of Costs.*

THE GERMAN-AMERICAN BANK
*vs.*
THE CITY OF BRENHAM. } No. 2092.

| | |
|---|---|
| To issuing 4 subpœnas, 1.00; 8 add'n'l names, 1.20 | 2 20 |
| To swearing jury, .35; swearing 10 witnesses, 1.00 | 1 35 |
| To filing 519 papers, 51.90; entering 1 order, .15 | 52 65 |
| To entering judgment, .75; docket fee, 3.00 | 3 75 |
| To certified copy cost bill, .50 | 50 |
| To certified copy of judgment for def't | 1 00 |
| To issuing 1st execution & return | 1 25 |
| To issuing writ of error & dupl. | 2 00 |
| To issuing citation in error & dupl. | 2 00 |
| To filing 7 papers, .70 | 70 |
| Transcript | 40 00 |
| Clerk's cost | $106 80 |

*Marshal's & Miscellaneous Fees.*

| | |
|---|---|
| J. T. Rankin, serving 11 subpœnas | $5 50 |
| J. T. Rankin, mileage on 1st execution | 5 75 |
| W. N. Brown, witness | 1 50 |
| Attorney's tax fee | 20 00 |
| Costs of Sam'l Hopkins (late clerk) | 27 40 |
| Total cost | $166 95 |

94 THE UNITED STATES OF AMERICA,
*Western District of Texas:*

I, D. H. Hart, clerk of the circuit court of the United States for the fifth circuit and western district of Texas, at Austin, do hereby certify that the foregoing pages contain a full, true, and correct copy of the record and of all proceedings as they appear on file and of record in this court in cause No. 2092, entitled German-American Bank *vs* City of Brenham, to which I have attached the original writ of error and citation in error, copies of which said writs are on file in my office.

In testimony whereof I have hereunto subscribed my name and affixed the seal of said circuit court on this the 18th day of August, A. D. 1888.

[The Seal of the U. S. Circuit Court, Western Dist. Texas, Austin.]

D. H. HART, *Clerk.*

Endorsed on cover: W. Texas C. C. U. S. No. 1136. The City of Brenham, plaintiff in error, *vs.* The German-American Bank. Filed September 26, 1888.

FILED.
SEP 30 1891
JAMES H. McKENNEY,
CLERK.

# In Supreme Court of the United States,

OCTOBER TERM, 1891.

No. 120.

THE CITY OF BRENHAM, PLAINTIFF IN ERROR,

*vs.*

THE GERMAN-AMERICAN BANK, DEFENDANT IN ERROR.

*In Error to the Circuit Court of the United States for the Western District of Texas.*

BRIEF FOR PLAINTIFF IN ERROR.

S. R. FISHER,
Counsel for Plaintiff in Error.

Hutchings Printing House, Austin, Tex.

# In Supreme Court of the United States,

OCTOBER TERM, 1891.

No. 120.

THE CITY OF BRENHAM, PLAINTIFF IN ERROR,

*vs.*

THE GERMAN-AMERICAN BANK, DEFENDANT IN ERROR.

*In Error to the Circuit Court of the United States for the Western District of Texas.*

BRIEF FOR PLAINTIFF IN ERROR.

## STATEMENT OF CASE.

This was an action by the German-American Bank of New York, against the city of Brenham, a municipal corporation of Texas, to recover on the following described interest-bearing coupons, attached to certain bonds issued by the city of Brenham, under an ordinance of said city, bearing date June 7, 1879:

(1.) Six coupons for $2.50 each, attached to bond number 1, for $50, making $15; (2.) Six coupons for $2.50 each, attached to each of the bonds, numbered 2 to 30 inclusive, (29 bonds) for $50 each, making 174 coupons, aggregating $435; (3.) Five coupons for $2.50 each, attached to each of the bonds, numbered 31 to 50 inclusive (20 bonds), for $50 each, making 100 coupons at $2.50 each, aggregating $250; (4.) Five coupons for $5.00 each, attached to each of the bonds, numbered 51 to 75 inclusive, (25 bonds) for $100 each, making 125 coupons at $5.00 each, aggregating $625; (5.) Six coupons for $25 each, attached to each of the bonds numbered 76 to 89 inclusive (14 bonds) for $500 each, making 84 coupons at $25 each, aggregating $2,100; and (6.) Five coupons for $50 each, attached to each of the bonds num-

bered 90 to 92 inclusive, (3 bonds) for $1,000 each, making 15 coupons at $50 each, aggregating $750.

Briefly stated, the plaintiff seeks to recover: *First*, on 280 coupons for $2.50 each, $700; *Second*, on 125 coupons for $5 each, $625; *Third*, on 84 coupons for $25 each, $2,100; and *Fourth*, on 15 coupons for $50 each, $750, making a total, exclusive of interest, of $4,175.

The plaintiff alleges, among other things: That the city of Brenham was authorized by its charter, granted in 1873, by Special act of the Legislature, to issue the bonds and the coupons annexed thereto; that, on the 31st day of July, 1879, under authority of an ordinance of said city passed on the 7th day of June, 1879, 92 bonds, with interest-bearing coupons attached, were issued by said city; that plaintiff was the legal owner and holder of said bonds, having purchased the same for value, in due course of trade, before maturity; that the city had lawful power and authority to issue the bonds and coupons; and that such power was conferred by its charter of incorporation. (Rec. 1-4; 11-15.)

The defendant interposed to the pleadings of plaintiff:

*First.*—A plea to the jurisdiction, on the ground that plaintiff is not the *bona fide* owner and holder of the bonds; but, on the contrary, that the transfer of the same to plaintiff by one Mensing was colorable only and for the purpose of conferring jurisdiction upon the court.

*Second.*—Demurrers, general and special, questioning the validity of the bonds and coupons; (Rec. 8, 15 and 16,) and

*Third.*—An answer alleging in substance:

That the city of Brenham is a municipal corporation, having a population of less than ten thousand inhabitants, incorporated on the 4th day of February, 1873, under the constitution and laws of Texas, with powers and privileges limited and restricted by the law of its immediate creation and the constitution of the State; that, as such corporation, it has no power now, and had none on the 7th day of June, 1879, to pass or enact resolutions, ordinances, or by-laws repugnant to the constitution and laws of said State, but all such resolutions, ordinances, and by-laws must conform thereto or otherwise be invalid and inoperative; that, under the

provisions of the State constitution, adopted in the year 1876, and prior to the passage of the ordinance of June 7th, 1879, in plaintiff's petition mentioned, cities and towns with a population of 10,000 inhabitants or less have authority to levy, assess, and collect *an annual tax in current money*, to defray *only* the current expenses of their local government, and are without power to borrow money and issue negotiable bonds therefor, and collect taxes for the payment of the same; and that, on said 7th day of June, 1879, no power existed in its city council to pass the ordinance of that date, and all bonds and interest-bearing coupons, which were issued in pursuance thereof, are without validity and constitute no legal and subsisting liability against it.

That the bonds specified in plaintiff's petition were signed by its mayor and secretary, but the names of the mayor and secretary were printed on the coupons; and that the ordinance, authorizing such printing of the signatures of the mayor and secretary, was illegal and void, and the bonds issued thereunder invalid.

That the ordinance aforesaid was further invalid and the bonds issued thereunder void, because the ordinance failed to provide for the payment of the interest on said bonds and to provide an adequate sinking fund for the payment of said bonds, as required by the constitution and laws of the State.

That the said ordinance was further invalid in that it authorizes the coupons attached to said bonds to be received in payment of taxes, in direct contravention of the constition and laws of the State.

That neither the mayor nor secretary, nor both of said officers, was authorized to execute the said bonds and coupons, and the same were issued without authority of law and in direct violation of the said ordinance of June 7th, 1879, for this, that said ordinance authorized the execution and issuance of fifteen thousand dollars of bonds, payable twenty years after the date thereof, redeemable, at the option of the defendant, at any time after *five* years from their date; that the supposed bonds, described in plaintiff's petition, can only be redeemed by defendant, according to to the recitals appearing upon their face, after the expira-

tion of *ten* years from the date thereof; and that the execution and issuance of said bonds were wholly unauthorized and the same are null and void.

That it is provided, in section 4, article 11, of the constitution of the State of Texas, that no county, city, or other municipal corporation shall become a subscriber to the capital stock of any private corporation or association, or make any appropriation or donation to the same, or in any wise loan its credit; that the prohibition therein contained denied the defendant the right to make an appropriation or donation to any railroad company or in any wise loan its credit in aid or for the benefit of any railroad corporation; but that, notwithstanding the constitutional restriction and inhibition above set forth, defendant's city council, on the said 7th day of June, 1879, passed the ordinance above referred to, to authorize the issuance of fifteeen thousand dollars of city bonds, redeemable after five years from date thereof, and said bonds were really and in fact issued in aid of the Gulf, Colorado & Santa Fe Railroad Company for the purchase of right of way over the streets of defendant and for the purchase of depot grounds in, and the construction of said road through, the said city of Brenham. That said bonds, so authorized to be issued for the railroad purposes aforesaid, were sold by defendant to the following named persons: Giddings & Giddings, $5,000; the said G. H. Mensing, $5,000, and to F. A. Engelke, $2,000; that, thereafter, the said Mensing became the owner and holder of the bonds, previously purchased by Giddings & Giddings and Engelke from defendant, and of the remaining $3,000 of the issue of fifteen thousand dollars, and is now the real owner and holder of the same. That said Giddings & Giddings, Mensing, and Engelke purchased said bonds with actual and personal knowledge of the unlawful purpose for which they were issued, as well as record notice of such illegal purpose as disclosed by the public records and minutes of defendant's city council; and that said bonds and interest-bearing coupons are null and void and constitute no legal charge against defendant.

That, if the plaintiff be the owner of said bonds and coupons, it purchased the said coupons after their maturity and

with knowledge of all the facts and circumstances attending the issuance of the same, well knowing that neither the said mayor nor secretary had authority, under the ordinance aforesaid, nor the defendant under the constitution and laws of the State, to issue the same, and with knowledge that they were issued to raise money for the purpose of enabling defendant to purchase the right of way and depot grounds for the said Gulf, Colorado & Santa Fe Railroad Company—an illegal purpose and one for which defendant was not authorized to issue negotiable bonds.

That said bonds are illegal and void because they do not specify the purpose for which they were issued; nor have they ever been registered with the Comptroller, as required by said ordinance and laws of the State.

That, at the date of the passage of said ordinance of June 7th, 1879, the current expenses of defendant, for ordinary municipal purposes, were more than sufficient to absorb the current revenues, derived from taxation within the constitutional limit, and there was no power in defendant to levy a tax to pay the interest and provide a sinking fund to meet the principal of said bonds; and hence said bonds are null and void.

That, prior to the time the bonds and coupons aforesaid were issued, defendant had issued five thousand dollars of bonds, for general purposes, which were outstanding at the time the bonds in suit were issued, and the bonds and coupons declared upon in this suit are void. (Rec., 8–11.)

Other supplemental pleadings, not material to be noticed in this connection, were filed by both parties. (Rec., 11–14; 15, 16.)

The case was heard on the original and supplemental petitions of plaintiff, on the amended original and supplemental answers of defendant, and on the evidence adduced at the trial, and resulted in a verdict and judgment thereon for plaintiff for $5,510.10. (Rec., 20, 21.)

The judgment of the court below, from which error was duly prosecuted, is here for revision upon the following

## ASSIGNMENTS OF ERROR.

*First.* The court erred, for the reasons stated in defendant's bills of exception, Nos. 1 and 2 (Rec., 21, 23), in overruling defendant's general demurrer and special exceptions to plaintiff's original and first supplemental petitions;

*Second.* The court erred in not admitting, for the purposes for which the same was offered, the testimony incorporated into defendant's bill of exceptions, No. 3 (Rec., 23–37), and in restricting and limiting its admission to the purposes therein stated;

*Third.* The court erred, for the reasons stated in defendant's bill of exceptions, No. 4 (Rec., 37–42), in admitting in evidence, over the objection of defendant, seasonably interposed, the evidence set out in said bill;

*Fourth.* The court erred in charging the jury as follows: "By way of further defense, the defendant contends that the city did not comply with that article of the constitution which provides that all cities before incurring a debt shall provide by ordinance for securing payment of the interest thereon and for a sinking fund to pay the principal, and therefore the plaintiff was charged with knowledge of their invalidity. The plaintiff relies on the following ordinance to show compliance with the requirements of the constitution: 'Sec. 7. That there be, and is hereby appropriated out of the general ad valorem tax of the city one-eighth of one per cent, or so much thereof as may be necessary, on the assessed value of the taxable property of the city, as a special interest and sinking fund with which to pay the interest on said bonds and liquidate the same; and said fund shall be kept separate from the other funds of the city and shall be used for no other purpose.' 'Sec. 8. That this ordinance go into effect and have force from and after its passage.' I charge you that the ordinance read to you, in connection with the other ordinances that I shall not read to you, shows a substantial and sufficient compliance with the law, and on this defense you will find for the plaintiff;" and in not giving in charge to the jury the following special instruction requested by the defendant: "If, from the evidence, the jury believe that, at the date of the issuance of

the coupons in suit and the bonds to which they were attached, the assessable property of the city of Brenham was not sufficient in amount to enable the city, by the imposition of lawful taxes, to raise revenue sufficient to provide for its current expenses, and to further provide for the payment of interest on the bonds and for providing a sinking fund of at least two per cent to pay the bonds at maturity, then you are charged that the city had no power to issue the coupons in suit and the bonds to which they were attached, and in this event you will find for the defendant." (Bill of Ex., No. 5, Rec., 43.)

*Fifth.* The court erred in charging the jury as follows: "Bonds to the amount of $15,000, with interest coupons attached, were issued in 1879 by the defendant city, then operating under the charter of 1873. In that charter section 2 says: 'That the city council shall have power and authority to borrow money, for general purposes, not exceeding $15,000, on the credit of the city.' The constitution of the State, 1876, allows such cities as Brenham to collect an annual tax to defray the expenses of their local government, not to exceed for any year one-fourth of one per cent. The power in the city to borrow money carries with it the authority to issue bonds in this case. And it may be that the limitation of the power to tax beyond one-fourth of one per cent impairs the ability of the defendant to pay the bonds and coupons, but I do not think it denies the capacity of the corporation in 1879 to issue the bonds as commercial paper,"— Because: (1) Under the constitution of Texas, the expense of carrying out the general governmental purposes of the defendant city is to be defrayed by the levying and collection of a tax and not by the issuance of negotiable bonds to be sold in open market; and (2) The bonds so issued by the defendant, are not clothed with the incidents of commercial paper. (Bill of Ex., No. 7, Rec., 46.)

*Sixth.* The court erred in charging the jury, in substance, as follows: That the ordinance under which the bonds were issued disclosed that they were to be issued and sold for a lawful purpose, and the bonds issued thereunder and purchased by Mensing recited a lawful purpose and are valid bonds, unless the jury believe that they were actually

issued and sold for an unlawful purpose, and that Mensing knew or had knowledge of the unlawful purpose for which they were issued at the time he purchased them; and that the city having substantially made, by the ordinance, provisions for the interest and sinking fund, the fact that there was an insufficient amount provided by the ordinance would not invalidate the bonds. (Bill Ex., No. 6, Rec., 44.)

*Seventh.* The court erred in not giving in charge to the jury the following special instructions asked by the defendant: "If from the evidence the jury believe that, at the date of the issuance of the bonds to which the coupons in suit were attached, the current expenses of the city of Brenham were equal to or in excess of the annual revenue accruing to it by taxation, then you are instructed that the issuance of said bonds was illegal and void, and you will return a verdict for the defendant." (Special instruction, No. 3, Bill Ex., No. 6, Rec., 45); ~~and~~, "If from the evidence the jury believe that, at the time the plaintiff acquired the coupons upon which this suit is brought, some of the coupons were past due, then you are instructed that the defendant may avail itself against plaintiff of any equities or defenses which would defeat a recovery thereon; and, in this connection, you are further instructed that, if from the evidence you believe the bonds with the coupons attached were, in fact, issued for the purpose of extending aid to the Gulf, Colorado & Santa Fe Railroad Company by purchasing and donating to it the right of way and depot grounds through and in the city of Brenham, or if you believe from the evidence that the bonds to which the coupons in suit were attached were sold and the proceeds used in the purchase of right of way and depot grounds for said railroad company, then you will, as to such of the coupons as were past due at the time plaintiff acquired same, find for the defendant." (Special instruction No. 1, Bill of Ex., No. 6, Rec., 45.)

"If from the evidence the jury believe that, prior to acquisition by plaintiff from Mensing of the bonds and coupons testified to by J. H. Mensing and by the president and cashier of the plaintiff bank, Mensing, prior to or at the time of his purchase or purchases, knew, or was in possession of facts from which he might have known, that the

bonds were really issued in aid of the G. C. & S. F. R. R. Co., and for its benefit, or that the proceeds of the sale of said bonds were appropriated by the city to the purchase of depot grounds and right of way for said R. R. Co., and Mensing, with such knowledge or means of knowledge, bought said bonds and subsequently transferred part of same to plaintiff for value, with overdue coupons attached, then you are instructed that as to all of the coupons attached to the bonds on which were the overdue coupons and as to the overdue coupons themselves the plaintiff is charged with notice of their invalidity and cannot recover." (Special Instruction No. 2, Bill of Ex. No. 6, Rec. 45.)

These assignments may be thus summarized:

The court erred in not sustaining defendant's demurrers, and in not directing a verdict for the defendant, because it affirmatively appears, not only from the pleadings and from the constitution and laws of Texas, but also from the testimony incorporated into defendant's bill of exceptions No. 3, (Rec. 23-37,) that the defendant city was without authority whatever to issue the bonds to which the coupons in suit were attached, and that the same were and are absolutely void for all purposes, and in the hands of all persons, no matter when or under what circumstances acquired.

As is apparent, the principal and controlling question here for decision is:

Had the city of Brenham, when it passed the ordinance of June 7, 1879, and when it sold the bonds therein authorized, the *power* to authorize the execution and sale, in open market, of ten per cent coupon bonds, negotiable and payable twenty years from date?

As the exceptions saved, (indicated in the assignments of error, *supra*,)—whether taken to the rulings of the court on demurrer to pleadings, or to the charge given, or charges refused—all present the same issue, viz: power in in the city of Brenham, when it sought to exercise it, to authorize, issue and sell negotiable time securities, the question will be considered:

*First*, With reference to the charter of 1873, considered

apart from the provisions of the constitution of 1876 relating to municipal corporations; and,

*Second*, With reference to the effect the said constitution had upon the power claimed under the charter.

I.

Without reference to the prohibitions, restrictions or limitations imposed by the constitution of Texas upon the debt-creating and taxing powers of municipal corporations, the charter granted to the city of Brenham in 1873, and under which it was operating in 1879, conferred no power, express or implied, to issue negotiable interest-bearing bonds of the character issued and sold by it in 1879.

The city of Brenham was incorporated by an Act of the Legislature of the State of Texas, approved Feb. 4, 1873; and, at the date of its incorporation and on the 7th day of June, 1879, had a population of less than ten thousand inhabitants. (Rec., 16, 23.)

The city now acts and since 1873 has acted under the special charter just referred to, which contains the following provision under which alone the power to issue the bonds sought to be authorized by the ordinance of June 7th, is claimed:

"Sec. 2. That the city council shall have the power and authority to borrow, for general purposes, not exceeding $15,000, on the credit of said city." (Sec. 2, Art. 24, Charter; Special Laws 1873, page 14.)

The ordinance referred to reads thus:

"*An ordinance to provide for the issue and sale of fifteen thousand dollars in coupon bonds of the city to borrow money for general purposes.*

"Be it ordained by the city council of the city of Brenham:

"Section 1. That the mayor be, and is hereby authorized and empowered to have printed coupon bonds of the city of Brenham to the amount of fifteen thousand dollars.

"Sec. 2. Said bonds shall be three (3) of the denomination of one thousand ($1,000) dollars, fourteen (14) of the

denomination of five hundred ($500) dollars, twenty-five (25) of the denomination of one hundred ($100) dollars, and fifty of the denomination of fifty ($50) dollars.

"They shall be made payable to bearer twenty years after date, at the office of the treasurer of the city of Brenham, with interest from date until paid, at the rate of ten per cent per annum, payable semi-annually on the first days of September and March, at the office of the treasurer of the city of Brenham, but the city shall have the right to redeem said bonds at any time after five years from date.

"Sec. 3. Said bonds shall be dated, and interest begin to run on the first days of ——— A. D., 18—. Provided that should any of said bonds be sold at a subsequent date, the amount of interest then due shall be endorsed as a credit on the coupons first due.

"Sec. 4. Said bonds shall be signed by the mayor and countersigned by the city clerk, and the seal of the city shall be affixed, and they shall be numbered and registered as series 2, No. —, giving the number of the bond issued, commencing with No. 1.

"Sec. 5. Coupons shall be attached to each of said, bonds for each semi-annual installment of interest, which said coupons shall have printed thereto the signature of the mayor and of the city clerk, and shall be received for general ad valorem taxes of the city.

"Sec. 6. Said bonds shall be negotiated and sold by the Mayor and Finance Committee of the city, as the same may be required for general purposes, but in no case shall they be sold at a greater discount than five per cent and the proceeds thereof shall be placed in the treasury of the city to the credit of the general fund.

"Sec. 7. That there be and is hereby appropriated out of the general ad valorem tax of the city one-eighth of one per cent, or so much thereof as may be necessary, on the assessed value of the taxable property of the city, as a special interest and sinking fund, with which to pay the interest on said bonds and liquidate the same; and said fund shall be kept separate from the other funds of the city, and shall be used for no other purpose.

"Sec. 8 That this ordinance go into effect and have force from and after its passage.

"Approved June 7, 1879.

"M. P. KERR, Mayor.

"Attest:

"C. H. CARLISLE, Secretary."

The bonds issued and sold are alike, except as to amount, and read as follows:

"UNITED STATES OF AMERICA.

"STATE OF TEXAS. CITY OF BRENHAM.

"CITY OF BRENHAM BONDS.

"No..... $100.

"Bonds for General Purposes, $15,000.

"Twenty years after date, for value received, the City of Brenham promises to pay to Bearer One Hundred Dollars, with interest at the rate of Ten per cent per annum from date, payable semi-annually on the first days of September and March of each year upon presentation of the proper coupon hereto annexed, both Principal and Interest payable at the office of the Treasurer of the City of Brenham.

"This Bond is redeemable by the City of Brenham after the expiration of Ten years from date hereof. This Bond is authorized by an ordinance of the City of Brenham, approved June 7, A. D. 1879.

"IN WITNESS WHEREOF, the Mayor and Secretary of the City of Brenham hereunto set their hands and affix the seal of the City of Brenham, this the ——day of——A. D. 1879.

".....Mayor.

".....City Secretary."

The coupons follow the same form, and read thus:

"The City of Brenham will pay to bearer Five Dollars for six months interest, due March 1st, 1880, at the office of the City Treasurer, on bond No.....

"M. P. KERR, Mayor.

"C. H. CARLISLE, City Secretary."

The bonds were sold and bought by various parties,

among whom was one G. H. Mensing, who, subsequently, became the holder and owner of the entire issue. Mensing transferred the greater part of same to plaintiff, as collateral security for moneys advanced and to be advanced to the firm of Mensing Brothers & Company, of which he was a member.

The interest upon the bonds was paid until March, 1883, the last payment of interest being of coupons which matured in September, 1882; after that time payment was declined.

In order to determine the existence or non-existence of the power to issue the bonds in controversy, recourse must be had to the charter, or act of incorporation, as the power, if it exist at all, is claimed to spring, solely, from Section 2, of Article 24, of the charter. (Special Laws of 1873, page 14, *supra* .)

The grant, in said section, is of "power and authority *to borrow, for general purposes*, not exceeding $15,000 upon the credit of the city." What, then, is the proper construction, the true meaning, of this charter provision—that is, what may the city do thereunder, and how, and in what manner must it be done? If empowered by this provision to borrow the amount authorized, ($15,000) at one time, in one sum, or at different times in different sums, then, after having once reached the limit, may the power be again exercised, or does it thereafter become inoperative?

The power "*to borrow*" is by the charter limited and restricted to "general purposes," and cannot be exercised in furtherance of any purpose that does not fall within such classification. The *general purposes* of a municipal corporation include *local government and police* and are carried out through the exercise of the taxing power, (Mayor v. Ray, 19 Wall., 475, 476) and not by the issuance of negotiable bonds, clothed with all the attributes of commercial paper. It is, therefore, reasonable, in the effort to ascertain the legislative intent, to conclude that the legislature, in conferring upon the city of Brenham the power *to borrow money, "for general purposes,"* up to a specified limit, intended to invest the city with the right to exercise the power once for all—either by borrowing the entire amount

at one time, or at different times—and to execute, as a voucher for money received from a lender, or in payment of a creditor to whom it had become indebted, the usual evidence of indebtedness in the shape of non-negotiable paper, for its re-payment. This, up to the limit within which the power might be exercised, would be a *borrowing* within the terms of the power. To execute or carry out such a power no necessity whatever would exist, and hence none should be implied, for the execution and sale, in open market, at a discount, of negotiable, interest-bearing time bonds, unimpeacable in the hands of a *bona fide* holder. Such an implication is never to be indulged, *except where it is necessary to give effect to an express power which otherwise would be nugatory.* (Cooley on Con. Lim., 235 and note; Cleburne v. Railway Co., 66 Texas, 461; 138 U. S., 687.)

Under the charter provision, the power to borrow money, for the purposes specified, could have been readily exercised in the usual modes; and the issuance and sale of negotiable, interest-bearing time bonds, to circulate as commercial paper, was in no sense essential to its enjoyment.

Charters of municipal corporations are to be tested, as to their powers and the manner of their exercise, *by the rule of strict construction;* and, while the construction is to be just, seeking first for the legislative intent, yet an ambiguity or doubt as to the existence or extent of the asserted power is always to be resolved against the corporation.

Says Mr. Dillon, in treating of the powers of municipal corporations:

"It is a general and undisputed proposition of law that *a municipal corporation possesses and can exercise the following powers, and no others:* First, those granted in *express words*; second, those *necessarily or fairly implied* in or *incident* to the powers expressly granted; third, those *essential* to the declared objects and purposes of the corporation—not simply convenient, but indispensable. Any fair, reasonable doubt concerning the existence of power is resolved by the courts against the corporation, and the power is denied. Of every municipal corporation the charter or statute by which it is created is its organic act. Neither the corporation nor its officers can do any act, or

make any contract, or incur any liability, not authorized thereby, or by some legislative act applicable thereto. All acts beyond the scope of the powers granted are void. Much less can any power be exercised, or any act done, which is forbidden by charter or statute. These principles are of transcendent importance, and lie at the foundation of the law of municipal corporations." (1 Dill. on Mun. Corp , 4th Ed., Sec. 89 and notes; Williams v. Davidson, 43 Texas, 33, 34; 57 Texas, 542; Merrill v. Monticello, 138 U. S., 681.)

"The *extent of the powers of municipalities*, whether express, implied, or indispensable, is one of construction. And here the fundamental and universal rule, which is as reasonable as it is necessary, is that, while the construction is to be just, seeking first of all for the legislative intent in order to give it fair effect, yet any ambiguity or doubt as to the extent of the power is to be determined in favor of the State or general public, and against the State's grantee. The rule of strict construction of corporate powers is not so directly applicable to the ordinary clauses in the charter or incorporating acts of municipalities as it is to the charters of private corporations; but is equally applicable *to grants of powers to municipal and public bodies which are out of the usual range*, or which *may result in public burdens*, or which, in their exercise, touch the right to liberty or property or, as it may be compendiously expressed, any common-law right of the citizen or inhabitant." (1 Dill. on Mun. Corp., 4th ed., sec. 91, and cases collected in note 2, p. 148.)

Invoking this rule, in the consideration of the provision in question, it is submitted: (1) That the city of Brenham had power thereunder to borrow, *in the ordinary and usual way*, for the general purposes of its local government, up to the limit fixed, and to execute and deliver the usual evidences of indebtedness; (2.) That, if at the time the city sought to exercise its borrowing power, the amount attempted to be borrowed, in connection with amounts, if any, previously borrowed, would carry the total amount beyond the $15,000 limit, the power could not be exercised; (3) That, after having exercised the power *once*, to the limit

named, the power would be exhausted and could not thereafter be invoked; and (4) That, the issuance of negotiable securities, such as are in controversy here, was not in *express* terms authorized, *and, not being essential to the exercise of the power to borrow for general purposes,* cannot be implied.

Power to borrow money for *general purposes* can never, it is thought, carry with it, as an incident, the power to issue and float, in open market, negotiable securities to run, with interest coupons, through a series of years. The power *to borrow* is not the legal equivalent of the power *to issue bonds;* and it is suggested that, while the power to issue bonds has sometimes, *in the absence of statutory or constitutional restrictions or prohibitions,* been implied, from the existence of an express power to borrow money in order to effectuate or execute a special purpose not within the ordinary governmental or general purposes of the municipality, and which is usually accomplished with funds raised by the sale of bonds, such power can never be implied where the purposes for which the borrowing is authorized are, as here, restricted and confined to *general purposes.* In such case, as the ordinary governmental purposes—*the general purposes*—of the municipality are carried out with revenues derived from taxation within authorized limits, it is submitted that the presumption should be indulged that the Legislature, in granting the power to borrow money *for general purposes,* intended to confer upon the municipality, in the administration of its ordinary governmental affairs, the right, to the extent indicated, to borrow money, in anticipation of its tax revenue, by direct loan or by incurring indebtedness, for which, in either case, it might give the usual evidences of indebtedness to be paid out of revenues derived from taxation.(1) This construction does violence to no rule for the construction of municipal charters and gives full scope to the power conferred upon the city to borrow money.

In stating what he regards as the true doctrine, with respect to the *implied power* of a municipal or public corporation to issue commercial paper, Mr. Dillon observes: "* * * That *merely as incidental to the discharge of its ordinary corporate*

(1) Bangor Savings Bank v City of Stillwater, 46 Fed. Rep. 899, 900.

*functions*, no municipal or public corporation has the right to invest any instrument it may issue, whatever its form, with that supreme and dangerous attribute of commercial paper which insulates the holder for value from defences and equities which attach to its inception. This point ought to be guarded by the courts with the utmost vigilance and resolution." (1 Dill. on Mun. Corp., 4th ed., Sec. 126 and note 1.)

The same learned jurist and author, after stating the conflict in the authorities touching the *implied power* of municipalities to issue commercial securities, and denying the soundness of the argument by which the existence of such power is sought to be sustained, says:

"The whole argument is, in our judgment, unsound. It is true that in this country private business corporations are usually considered to have the incidental power to borrow money or give negotiable paper as an evidence of their indebtedness, but in England it is held that express power is necessary to enable even railway corporations to draw, endorse, or accept bills of exchange. But admit that the American doctrine is otherwise, and that it is rightly so, still there is no resemblance between private and public or municipal corporations in this regard. The latter are simply agencies of government. They are not organized for trading, commercial, or business purposes. They have, in general, but one mode of meeting their liabilities, and that is by taxation, and it is upon this resource that creditors must be taken to rely. For hundreds of years in England such corporations have existed, without it even being contended that they could, without express authority, issue commercial paper. Private corporations are much more vigilant and watchful of their interests than it is possible for public or municipal corporations to be. The frauds which unscrupulous officers will be enabled successfully to practice, if an implied and unguarded power to issue negotiable securities is recognized, and which the corporation or the citizen will be helpless to prevent, is a strong argument against the judicial establishment of any such power. And the argument is unanswerable, when it is remembered that, in ascertaining the extent of corporate

powers, there is no rule of safety but the rule of *strict* construction; and that such an implied power is not necessary, however convenient it may be at times, to enable the corporation to exercise its ordinary and usual express powers, or to carry into effect the purposes for which the corporation is created. (Ibid Sec. 507.)

"We regard as alike unsound and dangerous the doctrine that a public or municipal corporation possesses the *implied power* to borrow money for its ordinary purposes, and as *incidental* thereto the power to issue commercial securities, that is, paper which cuts off defences when it is in the hands of a holder for value acquired before it is due. The cases on this subject are conflicting, but the tendency is towards the view above presented. The opinion of Mr. Justice Bradley, in a case before referred to, (Mayor v. Ray, 19 Wall.) evinces a thorough comprehension of the whole question, and, in our judgment, is sound in every proposition it advances, and must become the law of this country. This view is confirmed by the almost invariable legislative practice in the States to confer, when it is deemed expedient, upon municipalities and public corporations, in *express* terms, the power to borrow money or to issue negotiable bonds or securities; and it is of instruments thus authorized that we now proceed to treat. It is an undisputed doctrine that the power of public and municipal corporations to subscribe to the stock of railway companies and to issue bonds therefor must be *expressly* conferred. The Supreme Court of the United States has repeatedly adjudged that the grant of power to a municipal corporation to appropriate moneys in aid of the construction of a railroad, where the power is accompanied with a provision directing the levying and collection of taxes to meet such appropriation, and prescribing no other mode of payment, gives no power, but excludes it, to issue negotiable bonds in payment of such appropriation." (Ibid, 507a.)

In *Merrill v. Monticello* this court, through Mr. Justice Lamar, in denying the power of municipal corporations, under a power to borrow money, to issue negotiable bonds and sell them in open market as commercial paper, says: "It is admitted that the power to borrow money, or to incur

indebtedness, carries with it the power to issue the usual evidences of indebtedness by the corporation to the lender or other creditor. Such evidences may be in the form of promisory notes, warrants and, perhaps, most generally, in that of a bond. But there is a marked legal difference between the power to give a note to a lender for the amount of money borrowed, or to a creditor for the amount due, and the power to issue for sale, in open market, a bond, as commercial security, with immunity, in the hands of a *bona fide* holder for value, from equitable defences. The plaintiff in error contends that there is no legal or substantial difference between the two; that the issuance and disposal of bonds in market, though in common parlance, and sometimes in legislative enactment, called a sale, is not so in fact; and that the so called purchaser who takes the bonds and advances his money for it is actually a lender, as much so as the person who takes the bonds payable to him in his own name.

"We think the case of *Police Jury v. Britton*, 15 Wall., 566, is directly and absolutely conclusive against the plaintiff in error on this point. It was an action upon coupons of certain bonds issued by the Police Jury of Tensas Parish, La., the validity of which the defendant denied, upon the ground that they were issued without the authority of any law of that State. It appeared that the Police Jury had no express authority to issue the bonds in question; and, if they had any authority of the kind, it must be implied from the general powers of administration with which the said Police Jury was invested. The question, therefore, directly presented in that case was precisely the question directly presented in this case, viz: whether the trustees or representative officers of a Parish, county or other local jurisdiction, invested with the usual powers of administration, in specific matters, and the power of levying taxes to defray the necessary expenditure of the jurisdiction, have an implied authority to issue negotiable securities, payable in future, of such character as to be unimpeachable in the hands of *bona fide* holders, for the purpose of raising money or funding a previous indebtedness.

"The opinion of the court, delivered by Mr. Justice Brad

ley, clearly illustrated the fundamental distinction between issuing bonds merely as evidences of a debt or loan and issuing bonds for negotiation and sale generally, with respect to the powers of a municipal corporation. It said: 'That a municipal corporation which is expressly authorized to make expenditures for certain purposes may, unless prohibited by law, make contracts for the accomplishment of the authorized purposes and thereby incur indebtedness, and issue proper vouchers therefor is not disputed. This is a necessary incident to the express power granted. But such contracts, as long as they remain executory, are always liable to any equitable consideration that may exist or arise between the parties and to any modification, abatement or rescission in whole or in part that may be just and proper in consequence of illegalities or disregard or betrayal of the public interests. Such contracts are very different from those which are in controversy in this case. The bonds and coupons on which a recovery is now sought are commercial instruments, payable at a future day and transferrable from hand to hand * * . The power to issue such paper has been the means, in several cases which have been brought to our notice, of imposing upon counties and other local jurisdictions burdens of a most fraudulent and iniquitous character, and of which they would have been summarily relieved had not the obligations been such as to protect them from question in the hands of *bona fide* holders * * * . It seems to us to be a power quite distinct from that of incurring indebtedness for improvements actually authorized and undertaken, the justice and validity of which may always be enquired into. It is a power which ought not to be implied from the mere authority to make improvements.'" (138 U. S., 687, 688, 689.)

In the case of *Police Jury v. Britton*, just referred to, the court, in the further progress of the opinion, in speaking of the care to be exercised in indulging implications of power, observed: "But in our judgment these implications should not be encouraged or extended beyond the fair inferences to be gathered from the circumstances in each case. It would be an anomaly, justly to be deprecated, for all our

limited territorial boards, charged with certain objects of necessary local administration, to become the fountains of commercial issue, capable of floating about in the financial whirlpool of our large cities." (15 Wall., 572.)

In *Claiborne County v. Brooks*, this court, again through Mr. Justice Bradley, in reversing the ruling of the circuit judge to the effect that the county, under the power to erect a court house, had the implied power to contract out the work and to issue negotiable bonds of a commercial character in the payment thereof, said: "We cannot concur in this view. The erection of court houses, jails and bridges is amongst the ordinary political or administrative duties of all counties; and from the doctrine of the charge it would necessarily follow that all counties have the incidental power, without any express legislative authority, to issue bonds, notes and other commercial paper in payment of county debts and charges; and, if they have this power, then such obligations issued by the county authorities and passing into the hands of *bona fide* holders would preclude the county from showing that they were improperly issued, or without consideration, or for a debt already paid; and it would then be in the power of such authorities to utter any amount of such paper, and to fasten irretrievable burdens upon the county without any benefits received. Our opinion is, that mere political bodies, constituted as counties are for the purpose of local police and administration, and having the power of levying taxes to defray all public charges created, whether they are or are not formally invested with corporate capacity, have no power or authority to make or utter commercial paper of any kind, unless such power is expressly conferred upon them by law, or clearly implied from some other power expressly given, which cannot be fairly exercised without it." (111 U. S., 406, 407.) The court cited Police Jury v. Britton, 15 Wall., 566; The Mayor v. Ray, 19 Wall., 468.

In *The Mayor v. Ray*, in discussing the power of a municipal corporation to issue negotiable bonds to circulate as commercial paper, this court said: "A municipal corporation is a subordinate branch of the domestic government of

the State. It is instituted for public purposes only, and has none of the peculiar qualities and characteristics of a trading corporation, except that of acting in a corporate capacity. Its objects, its responsibilities, and its powers are different. As a local governmental institution, it exists for the benefit of the people within its corporate limits. The Legislature invests it with such powers as it deems adequate to the ends to be accomplished. The power of taxation is usually conferred for the purpose of enabling it to raise the necessary funds to carry on the city government and to make such public improvements as it is authorized to make. As this is a power which immediately affects the entire constituency of a municipal body which exercises it, no evil consequences are likely to ensue upon its being conferred; although it is not unusual to affix limits to its exercise for any single year. The power to borrow money is different. When this is exercised the citizens are immediately affected only by the benefit arising from the loan; its burden is not felt till afterwards. Such power does not belong to a municipal corporation as an incident of its creation. To be possessed, it must be conferred by legislation, either expressed or implied. It does not belong, as a mere matter of course, to local governments to raise loans. Such governments are not created for any such purpose. Their powers are prescribed by their charters, and those charters provide the means for exercising the powers; and the creation of specific means excludes others. Indebtedness may be incurred to a limited extent in carrying out the objects of the incorporation. Evidences of such indebtedness may be given to the public creditors. But they must look to and rely on the legitimate mode of raising the funds for its payment. That mode is taxation." (19 Wall., 475;) *Hill v. Memphis*, 134 U. S., 198, 203; *Young v. Clarendon Township*, 132 U. S., 340, 347, and other cases decided by this court are to the same effect. *

The city charter, we repeat, only authorized the city "*to borrow, for general purposes*, not exceeding $15,000, on the credit of the city." There is no *express* power to issue negotiable bonds, and the city could not, under the guise of an implied power springing from charter language, encumber the people with an indebtedness in the form proposed.

* Bangor San. Bank v City of Stillwater
46 Fed Rep. 899, 901.

It may be insisted, however, that the bonds in controversy have been held valid by our Supreme Court in the case of *Dwyer v. Hackworth* (57 Texas, 250, 251). In reply we say the question as to the validity of the bonds was not raised in that case. That suit was brought by Dwyer to enjoin the collection of certain taxes; the bond holders were not parties. The court disposes of the objection to the tax made by Dwyer, in reference to the bonds, in these words: "It appears from the agreed statement of facts, and the ordinance set out therein, that the city of Brenham, under its charter, had authority to borrow money for general purposes, and did so borrow, by selling its bonds, to the amount of fifteen thousand dollars. The validity of the tax levied to pay the interest on said bonds is not affected by the subsequent appropriation of the money borrowed to an alleged unauthorized purpose. Nor is it competent to enjoin the collection of said tax, on the ground of the invalidity of the bonds, *without making the holders of those bonds parties to the suit.* (Board v. Texas & Pacific Railway, 46 Texas, 316.) So far as it appears *from the agreed statement*, the tax of one-eighth of one per cent to pay interest and raise a sinking fund for the payment of said bonds was valid." It will thus be seen the court refused to entertain the question as to the *invalidity* of the *bonds*, because the *bond holders* were not *parties* to the record. Certainly the question before this court was not passed upon by the Supreme Court in that case. Upon this very point, see Lewis v. City of Shreveport, 108 United States—latter part of page 287—where this language is used: "All that was said by the Supreme Court of Louisiana must be construed in connection with the question then up for decision. *There is not a word about* the *validity* of the *outstanding bonds, nor of the right of the holders* to *recover upon them in a suit against the city.*"

The suit of Board v. Texas & Pacific Railway Co. (referred to by the court in the Hackworth case) was brought by citizens of Harrison county to annul certain proceedings had in the county court, ordering that bonds of the county should be issued to the railway company, and to enjoin the clerk of the court from attesting the bonds and the Chief Justice from issuing them, etc. The bond holders were not parties to the

suit. The plaintiffs insisted that as the holders of the bonds took them with the full knowledge of facts which rendered them invalid, it was unnecessary to make the holders parties. In reply, the court said: "But this is no answer to the objection that the *holders* of the bonds should be *parties to the suit;* for if they have no better title to them than said company, they are nevertheless entitled *to be heard before a decree is made in any way affecting their rights.*" (46 Texas, 329.) * * * * "Courts do not sit to determine *abstract principles*, but to decide practical issues, and settle controversies in which litigants have a substantial or immediate interest." (Ib., p. 329.) It is enough to say that the issue, as to the *validity* of the Brenham bonds, is neither touched upon nor affected by the decision in the case of Dwyer v. Hackworth, but that case does involve the legality of some of the proceedings of the municipal council, which will be hereafter noted.

If, however, in looking alone to the charter, it can be held that the city had power to authorize the bonds provided for in the ordinance of June 7, 1879, then it is submitted that the bonds are not the instruments authorized. The bonds *authorized* were redeemable, at the option of the city, in *five* years; the bonds *issued* are redeemable in *ten* years.

It is an elementary principle that, when a valid ordinance of a municipal corporation authorizes a certain thing to be done in a particular manner, the mode pointed out must be pursued. If municipal officers may disregard one requirement of the ordinance they may ignore another; and, pursuing the argument to its logical conclusion, they would have the power to bind the municipality without an ordinance at all. Such a doctrine will not be tolerated by the courts. It is said by the Supreme Court of Texas, in the case of *City of Bryan v. Page:* "The charter gave the power to employ legal counsel, but prescribed that the power be exercised by, or at all events in accordance with, an ordinance of the common council. The charter—the source of all the power of the mayor or council over the subject—having limited the mode of its exercise, they could not in a different mode make a valid contract; nor could they by any subsequent approval or conduct impart validity to such a contract. As without

an ordinance they were without power to bind the city by an express contract to pay for legal services, the law would not imply any such contract against the city. The law never implies an obligation to do that which it forbids the party to agree to do." (Brady v. Mayor of New York, 16 Howard's Practice, 432, cited in Zottman v. San Francisco. 20 Cal., 105); 51 Texas, 535; see, too, Color v. Cleburne, 131 U. S, 162.

In the present case the ordinance authorized the issuance of bonds redeemable in *five* years. The mayor executed a bond redeemable on its face in *ten* years. If the mayor had power, *ex mero motu*, to extend the term of redeemability of the bonds, he had like authority to enlarge the term of ultimate payment or change the rate of interest. But we maintain that he was without the power to do either. (C. & S. R. R. Co. v. City of Sparta, 77 Ill., 505; People *ex rel.* v. Town of Harp, 67 Ill., 62; McCoy v. Briant, 53 Cal., 250, 251.)

Thus far the argument has proceeded upon the assumption that plaintiff's pleadings on their face disclose a cause of action against defendant, in so far as the statement of facts, sufficient to authorize the issuance and sale of the bonds in question, is necessary for such purpose; but, it is insisted, that the same are fatally defective in failing to allege facts, sufficient under the law as it existed when the bonds were authorized and sold, to show the existence of such power.

Under the Constitution of Texas all cities do not stand upon the same footing as to the powers conferred in the issuance of bonds and imposition of taxes. One rule is prescribed for cities of over ten thousand inhabitants, and a different one for cities having less than that number. Brenham had, on the seventh day of June, 1879, and still has, less than ten thousand inhabitants, and while the fact is not apparent upon the face of the pleadings by direct allegation, the court will hold the allegations as applicable to cities of the less favored class, and require the pleader to set forth such facts as confer authority on the city of Brenham to issue the bonds in question. Employing the language of the Supreme Court, in the case of *Gould v. City of Paris*, "In testing this question, we have only to exam-

ine such provisions of our constitution as are applicable to cities of ten thousand inhabitants or less; for, although there was no proof as to the population of Paris on the tenth day of February, 1877, yet, as the plaintiff was seeking to coerce the city into the exercise of a power which it can possess only through the organic or statute law of the State, the *burden was on him to show* that this power had been granted. If granted to some cities, and not to others, it was in the necessary line of his proof to show that Paris was of the class thus favored by the State. Having failed to show that Paris contained more than ten thousand inhabitants, he cannot claim for it any powers especially granted to cities of that size which are not conferred upon cities of less population." (68 Texas, 517; see, also, Buchanan v. Litchfield, 102 United States, 287, *et seq.*) If it be necessary to make proof of authority to issue the bonds, it would seem to follow that the petition should state sufficient facts to let in the proof, for the latter must correspond with and conform to the former; and the allegations should be sufficiently specific to enable the court to determine whether the municipal body had lawful power to do the act claimed for it. Upon this point, it is said in *Hopper v. Covington:* "A demurrer admits only facts, and facts well pleaded. The town having but a limited authority to issue bonds for certain purposes, it is not enough for the plaintiff to aver in general terms that the town was authorized to issue the bonds in suit; but he must state the *facts which bring the case within the special authority.* There is nothing in this declaration, or in the copies of instruments annexed to and made a part of it, which shows, or has any tendency to show, for what purpose the bonds were made. The averment, that the defendant is a municipal corporation under the laws of Indiana, with full power and authority pursuant to the laws of said State, to execute negotiable commercial paper, is inconsistent with the public laws of the State, of which the courts of the United States take judicial notice. The averment, that the bonds held by the plaintiff were executed pursuant to the laws of the State, is but a statement of a conclusion of law, *which is not admitted by demurrer.* The declaration is fatally defective for not stating

the facts necessary to enable the court to judge *for itself* whether that conclusion of law has any foundation in fact." (118 United States, 151; see, also, Pumpelly v. Green Bay Co., 13 Wall., 166, 175; Cragin v. Lovell, 109 United States, 194; 3 Dill., 147; 76 New York, 564.

## II.

As to the effect of the constitution of 1876 upon the power of the city of Brenham to issue commercial paper, it is maintained:

1. That, if the power to execute and issue negotiable bonds existed in the city *prior* to the adoption of the constitution, the constitution upon its adoption, superseded, abrogated and repealed such power and thereafter there existed in the city no power, express or implied, to execute and sell such securities; and

2. That, if after the adoption of the constitution the power to issue bonds existed under the grant of authority "to borrow money" on the credit of the city, the power was not in this instance exercised in conformity with the imperative requirements of the constitution, and that the bonds are therefore void.

In 1876, the present constitution of the State of Texas was adopted. (See Sayles' Annotated Statutes.)

Among other provisions contained therein, of force and applicable at the time the bonds were authorized, issued and sold, were the following:

"Cities and towns having a population of ten thousand inhabitants or less, may be chartered alone by general law. They may levy, assess and collect an *annual tax to defray the current expenses of their local government*, but such *tax* shall never exceed, for any one year, one-fourth of one per cent, and shall be collectible *only in current money*." * * * (Art. 11, Sec. 4.)

"The State tax, on property, exclusive of the tax necessary to pay the public debt, shall never exceed fifty cents on the one hundred dollars valuation, and *no county, city or town*, shall levy more than half of said State tax, *except for the payment of debts already incurred*, and for the erection of public buildings, not to exceed fifty cents on the one hundred dollars in any one year, and except as in this con-

stitution is otherwise provided." (Art. 8, Sec. 9, as it stood prior to the amendment of 1883.)

"Counties, cities and towns are authorized, in such mode as may now or may hereafter be provided by law, to levy, assess and collect the tax necessary to pay the interest and provide a sinking fund to satisfy *any indebtedness heretofore legally made and undertaken;* but all such taxes shall be assessed and collected separately from that levied, assessed and collected *for current expenses of municipal government,* and shall, when levied, specify in the act of levying the purpose therefor, and such taxes may be paid in the coupons, bonds, or other indebtedness for the payment of which such tax may have been levied." (Art. 11, Sec. 6.)

"The legislature may constitute any city or town a separate and independent school district. And when the citizens of any city or town have a charter, authorizing the city authorities to levy and collect a tax for the support and maintenance of a public institution of learning, such tax may hereafter be levied and collected, if, at an election held for that purpose, two-thirds of the tax payers of such city or town shall vote for such tax," (Art. 11, Sec. 10.)

But *no debt for any purpose shall ever be incurred, in any manner, by any city* or county, *unless provision is made at the time of creating the same,* for *levying ana collecting a sufficient tax to pay the interest thereon, and to provide at least two per cent as a sinking fund.* (Art. 11, Sec. 7.)

And *no debt shall ever be created by any city,* unless *at the same time provision be made to assess and collect annually a sufficient sum to pay the interest thereon and create a sinking fund of at least two per cent thereon.* (Art. 11, Sec. 5.)

The provision of Section 5, Article 11, of the constitution is incorporated into Art. 427 of Revised Statutes.

"No county, city or other municipal corporation shall hereafter become a subscriber to the capital of any private corporation or association, or make any appropriation or donation to the same, or in any wise loan its credit; but this shall not be construed to in any way affect any obligation heretofore undertaken pursuant to law." (Sec. 3, art. 11.)

The foregoing are *all* the provisions of the constitution relating to cities of any class.

June 7, 1879, the city council of the city of Brenham passed another ordinance, entitled "An ordinance to provide for a just and equal valuation of property for the assessment of taxes." (See Rec., 25, for the ordinance in full.) This ordinance was declared illegal and void by the Supreme Court of Texas in *Dwyer v. Hackworth*, 57 Texas.

The annual current expenses of the city of Brenham for the year 1879, beginning April 1 of that year, exclusive of interest to accrue on the bonds, issued July 31, 1879, and a sinking fund of two per cent on the principal thereof, amounted to the sum of $4,097, in addition to which there was outstanding against the city a balance on former bonded indebtedness of $771.44. (Rec., p. 27.) The income of the city for the year 1879, from all sources, was by the city council estimated at $4,590. (Rec., p. 27.) The annual interest (10 per cent) on the bonds issued July 31, 1879, under alleged authority of the ordinance of June 7, 1879, amounted to $1500, and the (2 per cent) two per cent sinking fund to $300. (Rec., p. 27.) July 30, 1879, before the issuance of the bonds in question here, the valuation of property in the city of Brenham, subject to municipal taxation, as shown by the latest assessment, was $1,050,000. (Rec., 27.) The ordinance, under which the bonds were issued, appropriated *out of the general ad valorem tax of the city* one-eighth of one per cent, or so much thereof as might be necessary, to pay the interest on the bonds, and create a sinking fund for their payment at maturity. This one-eighth of one per cent, if it can be treated as the levy of *tax*—which, it would seem, it clearly cannot—would be effective only for the year 1879, and not for the succeeding years through which the bonds might run, and would yield but $1,312.50. (Rec., 27.)

The provisions of the constitution, upon which reliance is placed by the plaintiff in error, as showing *an absolute want of authority* upon the part of the city of Brenham to issue the bonds in controversy, have been construed by the Supreme Court of Texas in the cases of *Waxahachie v. Brown*, 67 Texas, 524, and *Gould v. City of Paris*, 68 Texas, and more

recently in the cases of *City of Terrell v. Dessaint*, 71 Texas, 770, and *Citizen's Bank v. City of Terrell*, 78 Texas, 450; and in each case the bonds were declared void because of constitutional prohibitions and restrictions upon the debt-creating and taxing powers of cities.

In *Gould v. City of Paris*, the court, in construing section 4, article 11, of the constitution (supra, 27), and section 9, article 8 (supra, 27), as it stood prior to the amendment of 1883, with the view of determining the extent to which the city of Paris, a municipality having less than ten thousand inhabitants, might exercise the taxing power, said, Chief Justice Willie delivering the opinion: "The first of these sections (sec. 4, art. 11,) contains a grant of power to levy taxes for a particular purpose, and, if it stood alone, might be construed not to prohibit taxation for other objects, if authorized by the Legislature. But the other section (sec. 9, art. 8,) is clearly prohibitive, and fixes the maximum of *ad valorem* taxation, whether levied by cities, counties or towns, at one-half of the State tax, with certain exceptions. The only exception, named in the section itself, is the tax for the erection of public buildings.

"If there be other exceptions, they are to be ascertained by reference to other portions of the constitution. The only section claimed as making an exception to the general rule laid down in section 9, article 8, is the above recited section 4 of the 11th article of the constitution; but this cannot, in a case where the State has levied fifty cents on the one hundred dollars, be said to fix a maximum different from that prescribed in the other section. Hence, in such a case, it cannot be said to be an exception, so far as the maximum per cent of taxation is concerned. If the State levies less than fifty cents on the hundred dollars, then, doubtless, a city of ten thousand inhabitants or less could still levy one-fourth of one per cent by virtue of article 11, section 4. A different maximum could be prescribed and the special grant in the last section would prove an exception to the general grant contained in the other. (Lufkin v. Galveston, 63 Texas, 557.) In the case just cited, it was held that the city of Galveston, containing, as it did, over ten thousand inhabitants, could, by authority of the constitution, levy a tax of

one hundred and six cents on the one hundred dollars, that amount being allowed by the special authority given in article 11, section 5, of the constitution. Article 8, section 9, was held to be the general rule as to taxation, where there were no exceptions prescribed; and a different maximum being prescribed for cities of over ten thousand inhabitants, they were entitled to tax up to that maximum. The converse of this proposition is also true, that where the limit is the same, the one clause is no exception to the other, and this is the case so far as the smaller class of cities is concerned.

"The limitation of one-half the State tax applies to such taxes as are levied for city purposes, which would include current expenses. Reading the two sections together, a city of the smaller class could levy one-fourth of one per cent for current expenses alone, but could not go beyond that amount for any and all corporate purposes, saving those made the subject of special exceptions by the constitution itself. In other words, the constitution said that these smaller cities might levy twenty-five cents on the hundred dollars for current expenses, but when they have done so they have reached the limit beyond which they are prohibited to go, and they shall levy no other tax except for the other purposes mentioned in the constitution. If the State should levy less than fifty cents on the hundred dollars and their limit should thereby be reduced to less than twenty-five cents on the hundred dollars, they may still impose that amount of tax for current expenses. Should they not need so large a tax for these expenses they might levy a smaller amount, and also another tax for other separate purposes, provided that the two together did not exceed one-half of the (authorized) State tax, or twenty-five cents on the hundred dollars." (68 Texas, 517–519.)

The court held in this case, that the constitution, of force when the contract was made, *limited the power to contract by the power to tax*, and that the city, having reached the limit of its taxing power, by having previously levied a tax of one-fourth of one per cent for current expenses, could not further exercise the power to tax, as was sought to be done by levying a tax of one-tenth of one per cent for the

purpose of paying the principal and interest of the bonds. (68 Texas, 519.)

The constitution plainly limits the right to provide for current expenses to the imposition of *a tax*, and does not confer the power to *issue bonds for such purposes*; and in all its provisions, referring to municipal corporations, is essentially restrictive. Justice Robertson, in *Cleburne v. Railway Company*, says: "Municipal powers are strictly construed in the United States, and the entire article in the constitution of 1875, on municipalities, indicates a determination to impose new limitations on the powers of cities, towns and counties." (66 Texas, 461.) In *City of Waxahachie v. Brown*, it is said: "But the policy of our laws seems to be to restrict municipal corporations as to the *creation of debts*, and not merely as to the issuance of bonds." (67 Texas, 531.)

Discussing section 2, article 12, of the constitution of Nebraska—similar in its general effect to the constitution of Texas—this court says: "On the contrary, we regard the entire section as a prohibition upon the municipal bodies enumerated, in the matter of creating and increasing the public debts, by express and positive limitations upon the legislative power itself." (Dixon County v. Field, 111 U. S., 89; Dillon on the Law of Municipal Bonds, p. 37, sec. 16.) In determining, therefore, the questions involved in this branch of the discussion, it is scarcely necessary to look further than our own constitution and the laws of the State; for, as stated by Justice Gaines, in Waxahachie v. Brown (referring to the conflict of authorities touching questions affecting the validity of municipal bonds): "A discussion of these authorities, however, would lead to no profitable result at this time, since, in our opinion, the provisions of our constitution and statutes, relating to the power of municipal corporations to levy taxes and create debts, *are decisive of the point now before us*." (67 Texas, 527.)

It is a fundamental rule in the construction of the *taxing* power of municipal bodies, and one accepted by all the authorities, that the grant or power should be construed with strictness, "and the reasonable presumption is held to be,

that the State has granted, in clear and unmistakable terms, all it has intended to grant at all." (Cooley on Taxation, p. 209.) The grant of power may be withdrawn at the pleasure of the State. (42 Texas, 658.) "And it is," says Mr. Cooley, "also a familiar rule that, in the execution of the power to tax, the municipalities must confine themselves clearly within the power conferred." (Ibid, 257; Williams v. Davidson, 43 Texas, 36, 37.) "They cannot, therefore, tax except for the *very purpose* allowed by law, and in the manner and under the conditions prescribed by law." (Ibid, 253, 254; Blessing v. City of Galveston, 42 Texas, 658.)

The right to tax is a dangerous power, involving "the power to destroy," and the defendant could only impose a tax for *authorized* municipal purposes, and a departure therefrom would necessarily vitiate the tax.

It is important to note that the charter of defendant was passed by the Legislature in 1873; the new constitution was adopted in 1876; and the ordinance authorizing the bonds in suit was passed June 7, 1879. It will, therefore, be observed that we are not now considering the effect of legislation enacted *under* the constitution, but rather the effect the constitution has upon legislation enacted *prior* to its adoption. The provisions of a municipal charter may be valid as construed in the light of an existing constitution, but wholly void when applied to a constitution thereafter adopted. This principle finds illustration in the cases of ~~*Aspinwall v. Commissioners of the County of Daviess* (92 How., 864)~~; Town of Concord v. Saving Bank (92 U. S., 628, et seq.); Concord v. Robinson (121 U. S., 170,) and others. If, therefore, the constitution of 1876 superseded the charter of 1873, so far as the power to issue bonds is concerned, the ordinance of June 7, 1879, becomes wholly illegal. The true intent and meaning, consequently, of the constitutional provisions pertinent to this inquiry, must be determined. In construing a provision of the organic law, "*the object to be accomplished, or the mischief designed to be remedied* or *guarded against*," may be considered. (Cooley on Const. Lim., fifth ed., 79.) And the policy of new provisions may be sought in the history of the times touching the same, and the state of previous legislation. (Anthony

v. Jasper County, 4 Dill., 143, 144; s. c., 101 U. S., 696; Concord v. Robinson, 121 U. S., 167; Dixon County v. Field, 111 U. S., 89.) Referring to the history of the issue of municipal bonds, in Missouri, it is said by Judge Dillon, in the case of *Anthony v. Jasper County*, that "to prevent such improper or imprudent issue of bonds in the future, the Legislature passed the act of March 30, 1872." (4 Dill., 143.) And, on page 144, the same judge proceeds: "The principle involved is one of great consequence. For illustration: Loose and general powers have been heretofore given in this State to municipalities and counties, to issue such bonds. This power has been taken away by the new constitution."

In the opinion, affirming the judgment in the *Anthony Case*, the Supreme Court use this language: "The object of the new legislation undoubtedly was to guard against unauthorized issues of this class of public securities. For this purpose a *new policy* was adopted by the State." (101 U. S., 696; Robertson v. Breedlove, 61 Texas, 324.) To the same effect are the decisions of this court in reference to the issuance of bonds by municipal bodies in Kansas, Nebraska and other States. Municipal corporations in Texas in 1875—when the constitution was framed and submitted to the people—constituted no exception to the general rule. Bonds, acquiring by transfer to purchasers for value all the incidents of ordinary negotiable securities, had been issued by various towns and counties of the State, and the holders subsequently, as is usually the case, were required to bring suits to enforce their collection. The city of Houston, notably, may be mentioned, and the records of the circuit court, at Galveston, will attest the accuracy of this statement. The cities of Galveston (Loonie v. Galveston, 54 Texas, 517,) and San Antonio (28 Texas, 19; 32 Ib., 405; 34 Ib., 50; 47 Ib., 548,) and the counties of Anderson (59 Texas, 666,) and Harrison (Board v. T. & P. R'y Company, 46 Texas, 316,) and others may also be included in the enumeration. It was to prevent the imposition of burdensome taxation and the indiscriminate issue of municipal bonds, with all the incidents attaching to commercial paper, that new and restrictive provisions were incorporated into the constitution—

features not to be found in any prior constitution of the State. Remark may also be made, and it is significant, that, in all suits (so far as we are advised) instituted to enforce collection of bonds issued by cities and counties under our new constitution, the power to issue them has been invariably denied. (See *Gould v. City of Paris*—fire engine bonds—68 Texas, 511; *Waxahachie v. Brown*—school bonds—67 Texas, 524; *Robertson v. Breedlove*—court house bonds—61 Texas, 314; *Terrell v. Dessant*, 71 Texas, 770; *Citizens' Bank v. Terrell* 78 Texas, 450.) The principles enunciated in the cases last cited clearly reflect the "new policy" inaugurated by the people of Texas in the adoption of the present constitution.

With the above rules of construction and established legal principles in view, let us examine the provisions of the constitution already quoted, *supra*.

These provisions limit the power of a city to tax to the following purposes:

1. To defraying *current expenses*—one-fourth of one per cent. (Art. 11, sec. 4.)

2. To payment of *debts already incurred* and for the *erection of public buildings*, for which a tax in excess of one-fourth of one per cent may be levied. (Art. 8, sec. 9; art. 11, sec. 6.)

3. To "the support and maintenance of a *public institution of learning*," under certain circumstances. (Art. 11, sec. 10.)

It is not claimed in this suit that the bonds were issued to erect public buildings, or to fund or discharge an existing indebtedness, or for school purposes. We are dealing with bonds issued, as upon their face recited and expressed in the ordinance, for general purposes, and to provide for the payment of which there was "appropriated out of the general ad valorem tax of the city one-eighth of one per cent, or so much thereof as may be necessary, on the assessed value of the taxable property of the city." (See ordinance, *supra*.)

The provision of the constitution having direct bearing upon the bonds in suit and the tax levied for their payment, will be found in article 11, section 4; and, under the terms of that section, the authority of defendant was limited,

*first*, as to the *amount* of the tax, and, *second*, as to the *purpose* for which it should be levied. The amount, or rate, is limited to one-fourth of one per cent, and the purpose, to defraying the *current expenses* of its local goverment; and, in that event, the command is imperative that the tax *shall* be collected only in *current money*. It is true that corporate functions must be performed and municipal purposes carried out, and moneys necessary for the objects indicated must be provided; but, to perform the one and carry out the other, the constitution expressly authorizes the imposition of a tax; and, the means being provided, the mode of raising them enjoined by the constitution must, under all the authorities, be pursued by the municipal body. For the "general purposes" of municipal government, moneys are raised *by taxation—not by the issuance of bonds*—and it was the evident purpose of the constitution to remove all possible doubt on the subject. The payment, out of moneys raised by taxation, of interest and principal of bonds issued for general corporate purposes, is but *a diversion of municipal revenues from a legal to an illegitimate purpose*, and will not be permitted. This principle is well expressed by Mr. Justice Bradley, in Chisholm v. City of Montgomery: "A municipal corporation is but a subordinate branch of the government; it represents the State sovereignty in a limited district and for specified purposes. Those purposes are local government and police. The *power* of *taxation is granted as a means of carrying out these purposes.* The diversion of these revenues *to other purposes* is *unlawful and ultra vires.*" (2 Woods' C. C. Rep., 594; see, too, 78 Texas, 460.)

Cities and towns are not trading corporations, with power to impose burdens *ad libitum* upon the people. They must pursue *strictly* the terms of the grant conferred by the State. No power, in the constitution, is given to defray expenditures for corporate purposes *by borrowing money*, much less to raise money *by the issuance and sale of negotiable securities running through a series of years, with the inevitable interest bearing coupons attached.* (2 Woods' C. C. Rep., 285.) Let us consider the effect of such a doctrine. Suppose a city have the right to levy a tax to defray current

expenses; these expenses annually amount to fifteen thousand dollars; a tax is levied sufficient to pay the amount; at the end of the year the fifteen thousand dollars is paid and the account is balanced. But, go further, and suppose that, instead of levying the tax, the city *borrows* the money for corporate purposes and issues, in evidence thereof, bonds for fifteen thousand dollars, maturing in twenty years, bearing ten per cent interest, and having semi-annual interest bearing coupons attached. How, then, stands the account? Annual interest of one thousand five hundred dollars must be paid, amounting, at the end of twenty years, to thirty thousand dollars, and, when that is satisfied, the city still has upon its hands the original debt of fifteen thousand dollars to discharge. Thus it appears that, in addition to repaying the amount originally borrowed, the incidental amount of thirty thousand dollars must be raised by taxation. But, had the method of the constitution been pursued, the entire transaction would have been closed the first year by the payment of only fifteen thousand dollars, the amount of current expenses. (Terrell v. Dessaint, 71 Texas, 770.)

It is, therefore, insisted that the defendant was without power to levy the tax to pay the principal and interest of bonds in suit, and, in the absence of authority to levy the tax, the contract between the plaintiff and defendant, as evidenced by the bonds and coupons, *is void.* Employing the language of the Supreme Court upon this point: "It follows that in this class of cases the *right to contract must be limited by the right to tax*, and if, in the given case, no tax can lawfully be levied to pay the debt, the *contract is void for want of authority* to make it." (Gould v. Paris, 68 Texas, 516, citing Loan Association v. Topeka, 20 ~~15~~ Wall., 660.)

The ordinance authorized the coupons to be received in payment of general *ad valorem* taxes; and is, therefore, plainly violative of the constitution.

The constitution is mandatory in requiring municipal taxes to be collected in money. The injunction is: "But such tax shall *never exceed*, for any one year, *one-fourth of*

*one per cent*, and shall be *collectible only in current money*." (Art. 11, Sec. 4.) What is the effect of the ordinance? As elsewhere stated, the latest assessment of taxes—which, under the constitution, as construed in *Citizens Bank v. Terrell*, 78 Texas, 457, must furnish the standard by which to measure the power to tax in making provision for the payment of a contemplated debt—disclosed (when the ordinance was passed) assessable property valued at *one million and fifty thousand dollars*. One-eighth of one per cent (the amount appropriated by the ordinance) would yield a revenue of only one thousand three hundred and twelve dollars and fifty cents. But, the annual interest on the bonds, amounts to one thousand five hundred dollars. Thus, it will be seen, that the special bond fund would not only be absorbed by the receipt of the coupons, but also a large part of the *general ad valorem tax* levied to pay "current expenses" incurred for other corporate purposes, and this in palpable violation and disregard of the constitution. (Bank v. Terrell, 78 Texas, 460.) Repeating the language of Mr. Justice Bradley: "The diversion of these revenues to other purposes is unlawful and *ultra vires*." (2 Wood's C. C. Rep., 594.)

No legal provision, in the ordinance of 1879, was made for the interest and sinking fund of these bonds, and the provision attempted to be made was inadequate.

The requirement of the constitution (Art. 11, Sec. 7, and Art. 11, Sec. 5,) *that provision shall be made, at the time of creating a debt, by the levy of a tax* sufficient, *annually*, to pay the interest and, at least, two per cent as a sinking fund, is imperative. (78 Texas, 456.)

In this instance, not only was *no tax levied* to meet interest and create a sinking fund (the provision attempted being an unlawful appropriation, merely, out of an existing tax for "current expenses," expressly appropriated to such purpose by the constitution (78 Texas, 460); but the provision attempted was inadequate and did not extend beyond the year 1879—no provision whatever being made, at the time of authorizing the bonds or afterwards when they were sold,

for the other years beyond 1879 they might run. (78 Texas, 456.)

In *Terrell v. Dessaint*, suit was brought upon a promissory note, held by the said Daissant, which read as follows: "$1,000. Two years after date the City of Terrell promises to pay P. H. Layen, or order, $1,000, for value received, with interest at 7 per cent from date. This note is given in payment for material for waterworks supplies, and *is payable out of the tax of one-fourth of one per cent collected annually for general purposes.*" It was dated May 13, 1885 and was signed by the Mayor and Secretary of the city. At the time of the execution of the note the city had leased or sold its waterworks to the Texas Gas and Water Company which had been in the possession of the property for some time. The management of the company not being satisfactory, it was agreed that its contract with the city should be rescinded, and that the city should resume possession of the works. As part of the contract of rescission, the city agreed to purchase from the company certain material on hand for the extension of the works and to pay therefor, the sum of two thousand dollars. For this sum the city issued drafts on its treasurer for about five hundred dollars, and executed two promissory notes, one being the note above set out.

Justice Gaines, in delivering the opinion of the court, after quoting the parts of Sec. 5, Art. 11, and Sec. 7, Art. 11, of the constitution (quoted *supra*,) said: "In Corpus Christi v. Woessner, 58 Texas, 462, it was intimated that there might be a question whether the provisions quoted applied to cities other than such as have more than ten thousand inhabitants; but the determination of the point was not necessary to the decision of that case, and it was not decided. The question is presented in the case before us, and we are of opinion that they must be held *to apply to all cities alike.* It is true that Section 5 relates, mainly, to cities having more than ten thousand inhabitants, and provides that they may be chartered by special acts of the legislature, and fixes the limits of their taxing power. Section 7 also relates, in the first place, to counties and cities upon the sea coast, and authorizes them to levy and collect taxes for the construction of sea walls, break waters and

sanitary purposes, and to create debts for these objects. But the provisions we have quoted contain no word or words which restrict their application to the cities previously mentioned in the same section. The language is general and unqualified, and we find nothing in the context to indicate that the framers of the constitution did not mean precisely what is said; *that is, that no city should create any debt without providing, by taxation, for the payment of the sinking fund and interest.*

"At the time the constitution was framed the history of the country and of the State afforded examples of municipal corporations which had become bankrupt through the reckless and extravagant management of their governing bodies, and its framers, doubtless, had under consideration the evils which result, both to the tax payers and the creditors of such corporations, from an unlimited power to create debts. From article 8, on taxation, and article 11, on municipal corporations, they seem to have kept prominently in view two objects—the one, to protect the inhabitants of municipalities against oppressive taxation; the other, to protect the creditors and to preserve the financial honor of such corporations. The first, was sought to be accomplished by section 9 of article 8, (since amended in pursuance of its original policy and spirit,) which fixes the limit of taxation and defines the purposes for which taxes may be assessed. The second, was intended to be attained by the section last named, in connection with the provisions quoted from sections 5 and 7 of article 11, which *limits the power of creating debts by making it proportionate to the power of taxation.* Such being, as it seems to us, the evident purpose of the framers of the constitution, we have no doubt that, although a specified class of cities had been previously mentioned in each of the sections from which we have quoted, when they said that no city should create any debt *without providing for the payment of the interest and sinking fund thereon*, they meant that the words should be construed according to their literal import, and not to restrict them to the class of cities which have been formerly mentioned in the same section." (71 Texas, 773, 774.)

In the same case, in determining what should be consid-

ered the creation of a debt prohibited by the constitution, the court further said: "It is held in the case previously cited (Corpus Christi v. Woessner) 'that the issue of warrants on the current expenses of the city, which do not exceed the current revenue derived from taxation,' is not the creation of a debt prohibited by the constitution. We do not doubt the correctness of this view. We freely concede that debts, for the ordinary running expenses of the city, payable within a year, out of the incoming revenues of the year, with other indebtedness not clearly in excess of the yearly income for general purposes, can be created by a city. But we think that a debt for current expenses, in order to be valid without a compliance with the constitutional and statutory requirements, to which we have referred, must run *concurrently with the current resources for such purposes, and that such a debt cannot be created, without such compliance, which matures at such time as would make it a charge upon the future resources of the city.*" (71 Texas, 774, 775.)

In *Bank v. Terrell*, where suit was brought to recover the amount of certain overdue coupons upon the bonds issued by the city of Terrell, payable to bearer, in which the defence was want of authority under the constitution and laws of the State to execute the obligation, the Supreme Court of Texas, in a careful opinion, considered the effect of the constitutional provisions referred to upon the power of the city to execute and sell negotiable securities. (78 Texas, 450, 454.)

After quoting article 8, section 9; article 11, section 4; article 11, section 5; and, article 11, section 7; the court, through Justice Henry, said: "A city cannot create a debt unless the power to do so is either, expressly or impliedly, conferred by law. If the law prohibits the creation of the debt for any purpose, then no attempt to create one would have any force. If the law permits the creation of debts for specified purposes only, an attempt to create one for a purpose not specified would be without validity. If the law authorizes the creation of debt for a specified purpose, *but limits the amount and prescribes the manner of creating such debt*, any attempt to create one greater than the amount spe-

cified or without substantially observing the regulations prescribed, would be equally without force.

"While our constitution authorizes the creation of a debt and the issuance of its negotiable bonds by the defendant city to provide for constructing water works, its mandate is imperative, *that no such debt shall be created without making provision, at the time of its creation, to assess and collect annually, a sufficient sum to pay the interest thereon and create a sinking fund of at least two per cent on the principal.* Until this is done, the *debt is not created and none exists.* If not forbidden, by another provision of the constitution, the levy may provide for the collection of a greater sum than the interest contracted for, and two per cent additional, but it cannot be less than that. The language is plain and unambiguous, *and in relation to cities the command is twice given. The provision must be sufficient when made.* If it subsequently becomes more or less than sufficient the validity of the obligation would not be affected.

"By another provision of the constitution the per centage upon the assessed value that may be levied is limited. The constitution, in effect, commands that a city, with less than ten thousand inhabitants, shall, in order to create a debt, take its latest assessment of property for taxes, and from that ascertain how much money a tax of twenty-five cents on the one hundred dollars of valuation will produce, and it may create a debt that that amount will provide for the payment of the interest on and two per cent per annum additional. The rule applies with all its force to cities having more than ten thousand inhabitants, except that the limit of the per centage of taxation is greater.

"The command of the constitution *that no debt should be created* without, *at the same time, providing for the levy and collection of a tax for its payment,* was evidently designed not more to ensure the payment of honest debts than to admonish the people whose property was being charged with them of that fact.

"The other provision, limiting the amount of debt that cities can charge themselves with, had its foundation in a wise public policy. These constitutional provisions are

made for observance, not evasion." (78 Texas, 455, 456, 457.)

"The command of our Constitution is, that, *when the debt is created, provision shall then be made for the levying and collecting a tax to discharge it.* It amounts to more than a direction that no debt shall ever be created above such a sum as the directed levy will pay. The Constitution will not be obeyed unless it shall be ascertained, *when and before the debt is created,* whether one-fourth of one per cent or less, on the taxable valuation, will *annually* pay the interest and sinking fund. The debt is not to go beyond *what a tax can be levied to pay,* and the clause in the Constitution that defines how much may be levied shows that it is to be done on a "valuation," one meaning of which, given by Webster, is "appraisment, as a valuation of land for the purpose of taxation." (78 Texas, 459.)

From the foregoing extracts it is clear that *no debt was created by the issuance and sale of the bonds issued by the city of Brenham under the ordinance of June* 7, 1879. When the city council enacted said ordinance, the taxable values of the city of Brenham, as shown by its latest assessment, amounted to one million and fifty thousand dollars. A tax of one-fourth of one per cent, or twenty-five cents on the hundred dollars valuation, would produce the sum of twenty-six hundred and twenty-five dollars, the maximum revenue which the city on its taxable values could secure through the exercise to its utmost limit of its taxing power for general purposes, or "current expenses."

For other *special* purposes authorized by the Constitution, viz: the payment of debts incurred prior to its adoption, or the erection of public buildings, the city might, within the limits authorized by the Constitution, levy and collect an additional tax. But the bonds in question were not as before observed, authorized or issued for either of such *special purposes;* and, hence, the provisions of the Constitution authorizing a levy beyond one-fourth of one per cent for current expenses cannot be invoked in aid of these bonds. As already stated, the annual current expenses of the city of Brenham for 1879, amounted to $4,097 without taking into consideration interest to accrue on the bonds ($1,500), two

per cent as a sinking fund ($300), and $771, due on former bonded indebtedness. With these items included the total current expenses for 1879 aggregated $5,897, to defray which the income of the city from all sources was but $4,590. To meet the interest and create a sinking fund *no levy of tax was made*, in the ordinance authorizing the bonds, or prior to or at the time of their issuance and sale, *as peremptorily required by the Constitution;* but, in lieu thereof, an appropriation, *out of a tax already levied for current expenses*, of one-eighth of one per cent, which appropriation ran but for the year 1879 and produced but $1,312.50 an amount far short of the interest and sinking fund for even one year. Besides, the interest coupons were made receivable for taxes levied for "current expenses," expressly required *to be collected in current money;* and a part of the current revenues arising from the tax imposed to defray current expenses, and devoted by the Constitution to the support of the city government, was without authority appropriated and devoted to the payment of interest and sinking fund. (Citizens Bank v. Terrell, 78 Texas, 460.)

Provisions are frequently made in constitutions or in charters or legislative acts, says Mr. Dillon, to prevent the creation or increase of municipal indebtedness beyond specified limits, or except upon certain conditions. Such limitations have been found by experience to be necessary to prevent extravagance, are remedial in their nature, are based upon the wise policy of paying as you go, and ought, therefore, to be construed and applied to secure the end sought. (1 Dill. on Municipal Corporations, sec. 130.)

Under a charter, prohibiting the common council of a city from "authorizing any expenditure for any purpose," in the current political year, exceeding the annual tax levy, the council cannot authorize any expenditure to be made within the year exceeding the limit; but they are not forbidden to authorize in that year an expenditure to be made in a subsequent year, for services to be performed in such subsequent year. (Weston v. Syracuse, 17 N. Y., 110.) The charter of Chicago contained the provision that "no contract shall be made by the common council, and no expense incurred unless an appropriation shall have been previously

made concerning such expense," and the comptroller is required to submit each year an estimate of the amount necessary to defray the expenses of the city for the current year. With this provision in force the city made a contract with a gas company, whose works were already complete, to take gas for its streets and public buildings at a specified price for the period of ten years. This contract was held invalid on the ground, among others, that, under the above charter provision, there was no actual or reasonable necessity to make a contract extending over ten years, no appropriation having been made commensurate with the obligations of the contract. (Garrison v. Chicago, 7 Bissell, 447; 1 Dill. on Municipal Corporations, sec. 131.)

A municipal charter provided that it should not be lawful for the city council to make, or authorize to be made, "any contract for the payment of money beyond the current fiscal year," declaring every such prohibited contract "illegal and void." In construing this language the court says: "By this section of the charter, the legislature have, in the most explicit manner, prohibited the city council from contracting any debt beyond the fiscal year. If the city council had, at the time the contract was made in 1845, passed an ordinance that the expense of lighing the streets for that year should be paid in 1848, by a tax then assessed for that purpose, it would have come within the letter of the prohibition. It is none the less a violation of its spirit that the council did not pass the ordinance providing for its payment until 1848." (Jonas v. Cincinnati, Ohio St., 318, 332. See, too, 1 Dillon on Municipal Corporations, 4th Ed., Sec. 134 and notes.)

The constitution of California provides that no municipal corporation "shall incur any indebtedness or liability in any manner or for any purpose, exceeding in any year the income and revenue provided for it for such year, without the assent of two-thirds of the qualified electors thereof voting at an election to be held for that purpose," and this provision is held to mean that, subject to the exception, "each year's income and revenue must pay each year's indebtedness and liability, and that no indebtedness or liability in any one year shall be paid out of the income or revenue of

any future year." (San Francisco Gas Works v. Brickwedel, 62 Cal., 641.) By the constitution of Colorado "no county shall contract any debt by loan in any form except for the purpose of erecting necessary public buildings," etc., and "the aggregate amount of indebtedness of any county for all purposes, exclusive of debts contracted before the adoption of this constitution, shall not exceed at any time, a specified rate. The Supreme Court of that State, ruling upon a contention that the limitation was upon indebtedness "by loan," held that, while these two propositions are associated they are none the less independent declarations;" that, in determining the amount of indebtedness at any time, county warrants are to be taken into the account, all those which increase the indebtedness beyond the amount limited being void; that the county authorities, as well as the parties dealing with them, are bound to take notice of the limit prescribed in the constitution, (People v. May, 9 Col., 81; see, also, 130 U. S., 662; Ib. 674; 1 Dill. on Mun. Corp., 4th Ed., Sec. 134); and that the limitation includes debts incurred by operation of law as well as those arising upon express contracts, but does not include involuntary liability arising *ex delicto*. (May v. People, 9 Col., 404.)

The constitution of Iowa contains the provision that "no county or other political or municipal corporation, shall be allowed to become indebted in any manner, or for any purpose, to an amount exceeding five per cent on the value of the taxable property within such county or corporation, to be ascertained by the last State and county list, previous to the incurring of such indebtedness." Under this provision, as construed by the Supreme Court of the State, no indebtedness, for whatever purpose created, is exempted from the operation of the prohibition, and it applies to negotiable bonds issued under legislative authority as well as to other debts; and the creditor or bondholder must at his peril take notice that the constitutional limit is not exceeded. (See 78 Texas, 460.) Substantially similar provisions in other constitutions, have received a like construction. (Bank v. School District, 39 Io., 490; French v. Burlington, 42 Io., 614 and cases cited; 1 Dill. on Mun. Corp., Sec. 135, note 1.)

Under the constitutional provision in Illinois which reads

thus: "No county, city or township, school district, or other municipal corporation shall be allowed to become indebted in any manner or for any purpose, to an amount including existing indebtedness, in the aggregate exceeding five per centum on the value of the taxable property therein, to be ascertained by the last assessment for State and county taxes, previous to the incurring of such indebtedness," (Cons. 1870, Art. 9, Sec. 12,)—the Supreme Court of the State has established the doctrine that a corporation is prohibited from becoming indebted in any manner or for any purpose, beyond the limit, even for necessary current expenses. (Springfield v. Edwards, 84 Ill., 626; Prince v. Quincy, 105 Ill., 138, 215.) It cannot incur corporate indebtedness beyond the limit in anticipation of the collection of taxes levied; and such indebtedness and the evidences thereof are void. (Law v. People, 87 Ill., 385; Fuller v. Heath, 89 Ill., 282.) But a corporation may issue a warrant for authorized expenses drawn against taxes actually levied and to be collected for the purpose, which warrant, while not creating a debt or liability against the corporation, may yet operate as an assignment of so much of the particular taxes when collected, and such warrant may be made receivable for taxes. (1 Dill. on Mun. Corp., 4th Ed., Sec 136.)

The constitution of Indiana contains a provision, substantially identical with that of Iowa and Illinois before referred to, under which it is held that a city whose indebtedness has reached the limit cannot create a further debt even for necessaries. (Sackett v. New Albany, 88 Ind., 473; 1 Dill. on Mun. Corp., (4th Ed.) note 1, page 205.)

The constitution of Pennsylvania provides that: "The debt of any city, except as herein provided, shall never exceed seven per centum upon the assessed value of the taxable property therein." The city of Erie made a contract with private persons for the erection of a market house, by the terms of which the city agreed to pay, for twenty-five years, a rental of $1500 per annum. A bill in equity was filed by taxpayers, stating the above contract, also that the indebtedness of the city was already in excess of the seven per centum limit, and praying for an injunction to restrain the city from paying any money on the said contract. The de-

fendant filed a general demurrer. As it did not appear upon the face of the bill that the annual revenue, after meeting the other municipal liabilities, was sufficient to meet the proposed contract liability, the court held, on the facts before it, that the contract, if sustained, would create an indebtedness in violation of the constitution, and granted the injunction. (1 Dill. Mun. Corp. 4th ed., Sec. 136 and notes.)

Again, the bonds, if authorized. do not specify the purpose for which they were issued; nor have they ever been registered with the comptroller, as the law requires; nor do they contain recitals showing that these requirements have been complied with.

How far the provisions of the Revised Statutes of Texas relating to municipal corporations, and in particular articles 421 and 423, are applicable to a city like Brenham operating under a special charter, granted prior to 1876, is not clear (Bank v. Terrell, 78 Texas, 457; 1 Dill. on Mun. Corp., 4th ed. sec. 87.)

Let it be assumed, however, that the sections referred to have application, and the illegality and nullity of the bonds becomes still more apparent. The proposition just stated asserts that the bonds contain no recitals that the law regulating their issuance has been complied with; further, that they do not specify the purpose for which they were issued, and contain no recital or intimation that they have been registered by the Comptroller. The recitals of the bonds are as follows: "This bond is redeemable by the city of Brenham after the expiration of ten years from date hereof. This bond is authorized by an ordinance of the city of Brenham, approved May 7, 1879." The bond is set out *in extenso* on page 12, *supra.*

The articles referred to, in force at the date of the passage of the ordinance (June 7, 1879,) and the issuance of the bonds (July 31, 1879,) provide:

"Art. 421. All bonds shall specify for what purpose they were issued," etc. * * * *

Art. 423. It shall be the duty of the mayor, whenever any bond or bonds are issued, to forward the same to the

Comptroller of Public Accounts of the State, whose duty it *shall be* to register said bond or bonds in a book kept for that purpose, *and* to *endorse* on *such bond so registered his certificate of registration*, and to give, at the request of the mayor, his certificate certifying to the amount of bonds so registered in his office up to date." See, in this connection, Art. 424, R. S. .

The foregoing statutory provisions are but re-enactments of sections 77 and 79 of the act of March 15, 1875, (Gen. Laws 1875, p. 134, secs. 77 and 79,) carried forward in the Revised Statutes. (Gould v. City of Paris, 68 Texas, 517.) In the Case of Gould, speaking of the act of 1875, Chief Justice Willie says: "The act of 1875 was in force when our present constitution took effect, and remained in force thereafter, and at the time this contract was made, except in so far as it was repugnant to the constitution." (Page 517.)

There are no *charter* provisions of defendant regulating the manner of issuance of bonds, nor prescribing what the recitals of the bonds shall contain, and none requiring the registration of the bonds nor the certificate of the Comptroller to be endorsed thereon. Hence we must look to the constitution and General Laws, as it is expressly provided, in the charter of defendant, that the city of Brenham "may ordain and establish such acts, laws, regulations and ordinances, *not inconsistent with the constitution and laws of this State or of the United States*, as shall be needful for the government, interest, welfare and good order of said body politic." (Printed Charter and Ordinances, p. 5, sec. 1, art. 1, of the Charter of 1873; Special Laws of 1873, p.——.) Again, it is said in another section of the charter: "The council shall have power to pass, publish, amend or repeal all ordinances, rules and police regulations *not contrary to the constitution and laws of this State*," etc. (Printed Charter and Ordinances, p. 24, sec. 43.)

Referring, then, to the laws of the State above mentioned, it will be seen that it was imperatively required: 1, The bonds shall specify the purpose for which they were issued; 2, They shall be registered with the Comptroller; and, 3, The Comptroller is required "to endorse on *each bond* so registered his certificate of registration."

None of these requirements were complied with by defendant in the issuance of the bonds in suit, and there is *an absence of recitals in the bonds either that compliance was had therewith, or that they were issued pursuant to and in compliance with the constitution and laws of the State.* Here we are dealing with and treating of bonds containing no recitals, save a reference to the ordinance under which they were issued; and hence the plaintiff is not in a position to invoke that line of decisions which hold that proper recitals cure mere *irregularities* in the proceedings had preliminary to the issuance of municipal bonds. (Hopper v. Covington, 118 U. S., 150.) It, however, cannot, in any event, invoke that rule in this case, for the objections to the bonds urged are not irregularities merely pertaining to the proceedings preliminary to their issuance, but are objections founded in the statute which requires certain things to be done as a prerequisite to the issuance of a perfect bond. Upon this point this court, in *Merchants' Bank v. Bergen County*, says: "Unless, therefore, there is something in connection with their issue to estop the Board from contesting their validity, they can in no manner bind the county. This is not a case where there existed in the Board a general power to issue negotiable securities of the county so that parties would be justified in taking them when properly executed in form by its officers. It is a case where there was no power except as specially delegated by law for a particular purpose. All persons taking securities of municipalities having only such special power, must see to it that the condition prescribed for the exercise of the power existed. As an essential preliminary to protection, as a *bona fide* holder, authority to issue them must appear. If such authority did not exist, the doctrine of protection to a *bona fide* purchaser has no application."

"In the bonds of Bergen county there are no recitals. The bank, in taking them, was bound to ascertain whether or not they were authorized. Had it examined the register of the bonds issued to take up the matured bonds, which was a public record of the county and open to inspection, it would have learned that the bonds which it received were not of the number thus authorized. Content to rely upon

the unsupported representations of Bogert, it can not now cast upon the county the consequences of its own mistake." (115 U. S., 391, 392.)

The cases of Township of Oakland v. Skinner, 94 U. S., 258; Jasper county v. Anthony, 101 U. S., 696, 698; Dixon county v. Fields, 111 U. S., 85; and, 118 U. S., 150 are to the same effect.

In this connection the fact is also adverted to that the *real purpose* of the issue of these bonds, as abundantly disclosed by the record, was an illegal and prohibited purpose —aid to the Gulf, Colorado & Santa Fe Railway Company, in the purchase for and donation to it of right of way through and depot grounds in the city—and that the greater part of the proceeds arising from their sale was so appropriated and diverted. (See Bill of Exceptions No. 3, Rec. 23-37; in particular, see Rec. 29, 30, 31, 32.) Cleburne v. Railway Co., 66 Texas, 460; Art. 11, Sec. 3, Cons., 1876. Defendant asked appropriate instructions as to this issue, which were refused and bill saved. (See Instructions Nos. 1 and 2, and charge of court *supra*; Rec. 45.)

## III.

No authority—power—to issue and sell, in open market, existing at the time when the power was sought to be exercised, no person purchasing said bonds, no matter when or under what circumstances, can be protected; and no act of the city or its officials can operate as an estoppel against it. (New Orleans vs. Clark, 95 U. S., 652; Buchanan v. Litchfield, 102 U. S., 287; Dixon v. Field. 111 U. S., 92; 121 U. S., 166; 118 Ib., 150; 20 Wall, 667; 108 U. S., 287.)

When the debt as here is void in its inception for want of authority to create it, no subsequent ratification of it *by the collection of taxes or otherwise* can give it any validity, nor can there be such a thing as a *bona fide* holder of the obligations with a right to collect them notwithstanding the want of power in the city to create the debt (78 Tex., 455, 456, 457). To the same effect are the decisions of this court. (Davies County v. Dickinson, 117 U. S., 657; Hays v. Holley Springs, 114 U. S., 120; Merrill v. Monticello, 138 U. S., 682; Buchanan

v. Litchfield, 102 U. S., 278; East Oakland v. Skinner, 94 U. S., 255; Marsh v. Portland Co., 10 Wal., 676.)

Peremptory constitutional provisions that municipalities *shall not issue bonds*, exceeding a specified percentage on the value of the taxable property within the municipality, to be ascertained by the official assessments or valuations for the purposes of taxation, are regarded by the Supreme Court of the United States, as well as by the State tribunals, as fixing a limit beyond which the power to issue bonds cannot be legislatively conferred, and the Supreme Court holds, that, if bonds be issued in excess of such limit, they are void in the hands of *bona fide* holders, notwithstanding *a recital therein* that they are issued *under and in pursuance of the constitution of the State*, inasmuch as such recital will not estop the municipality from showing that the bonds were issued *in violation of the constitutional limitation*; and, if this be shown, the plaintiff cannot recover, though he be a holder for value and without actual notice of any over-issue. (1 Dill. on Mun. Corp., 4th ed., sec. 529a).

A purchaser of municipal bonds is bound to take notice of any provisions of the constitution or legislation of the State relating to the power of the municipality to issue them; and, if the act conferring the power is in conflict with the constitution, the bonds are void, even in the hands of a *bona fide* holder for value. And the purchaser must also notice the provisions and extent of the legislative enactments on the subject. (1 Dill. on Mun. Corp., 4th ed., sec. 542).

## IV.

That plaintiff, or other holder of these bonds, may have a remedy against the defendant other than an action on the bonds is, at least questionable. (Hackettstown v. Swaekhamer, 37 N. J., L., 191; Mayor v. Ray, 19 Wall., 468, 480; 1 Dill. on Mun. Corp., 4th Ed., note to section 127, and note 1 to Sec 122, pp. 187, 188.) But that question cannot arise here, and it is submitted that a recovery in this action cannot be sustained.

The second and third assignment of error, (*supra*) questioning the correctness of the rulings of the circuit court in

* Litchfield v Ballou. 114 U. S. 190.

excluding in the one instance and admitting in the other proffered testimony, are not waived; but, in view of what has already been said herein, are submitted without elaboration.

It is respectfully submitted that, as was done in 130 U. S., 662, the judgment should be reversed and the cause remanded with directions to render judgment for the defendant.

S. R. FISHER,
Counsel for Plaintiff in Error.

# In Supreme Court of the United States.

OCTOBER TERM, 1891.

NO. 120.

THE CITY OF BRENHAM, PLAINTIFF IN ERROR,

*vs.*

THE GERMAN-AMERICAN BANK, DEFENDANT IN ERROR.

*In Error to the Circuit Court of the United States for the Western District of Texas.*

BRIEF FOR DEFENDANT IN ERROR.

HENRY SAYLES,
Counsel for Defendant in Error.

ABILENE PRINTING COMPANY, ABILENE, TEX.

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*In Error to the Circuit Court of the United States for the Western District of Texas.*

BRIEF FOR DEFENDANT IN ERROR.

## STATEMENT OF THE CASE.

This suit was brought by defendant in error, to recover the amount of interest due on certain bonds, issued by the plaintiff in error, and evidenced by the over-due coupons attached to the bonds. Judgment was rendered in favor of the defendant in error for the amount of interest due and unpaid.

The questions presented by the record are:

**1st. Did the city of Brenham on the 7th of June, 1879, have authority under the constitution and laws of Texas to contract a debt of fifteen thousand dollars for general purposes.**

**2nd. Did the city of Brenham under its charter, have the authority to issue negotia-**

**ble interest bearing bonds on the 7th of June, 1879, to borrow money on the credit of said city for general purposes.**

**3rd. If the preceding questions are answered in the affirmative, then are such bonds so issued, and in the hands of a purchaser for value and without notice, void, on the ground that there is a variance between the ordinance and the bonds, in this: that the ordinance provides for the issuance of bonds payable in twenty years, and redeemable at the pleasure of the city after five years, and those issued are payable in twenty years, but not redeemable till after the expiration of ten years.**

The defendant in error in support of the judgment of the court, relies upon the following propositions:

## I.

**The city of Brenham had authority on the 7th of June, 1879, to authorize the execution and delivery of its coupon bonds, negotiable and payable twenty years after date, for the purpose of borrowing money for general purposes.**

It was proven that the city of Brenham acts, and since 1873 has acted, under a special charter granted it in that year by the legislature of the state, which charter is a general law of the state of Texas. (See special acts 13 Legislature.) The charter of the city of Brenham provides: Art. 1. That all the inhabitants of the city of Brenham shall continue to be a body politic and corporate, with perpetual succession by the name and style of the city of Brenham; and as such they and their suc-

cessors by that name shall have, exercise and enjoy all the rights and immunities, powers, privileges and franchises now possessed and enjoyed by said city, and herein granted and conferred, and shall be subject to all the duties and obligations now pertaining to or incumbent on said city, as a corporation, and may ordain and establish such acts, laws, regulations and ordinances not inconsistent with the constitution and laws of this state, or of the United States, as shall be needful for the government, interest, welfare and good order of said body politic. And under the same name shall be known in law, and be capable of contracting, being contracted with; * * * * * May take, hold and purchase, lease, grant and convey such real and personal or mixed property or estate as the purposes of the corporation may require, within or without the limits thereof, and may make, have and use a corporate seal and change and renew the same at pleasure.

The city council shall have the management and control of the finances and other property, real, personal and mixed, belonging to the corporation, and shall likewise have the power to appropriate money, and to provide for the payment of debts and expenses of the city.

**The city council shall have the power and authority to borrow, for general purposes, not exceeding fifteen thousand dollars, on the credit of the city.—Art. 3..**

The general powers of the city, among others enumerated, are, to provide the city with water; to make, regulate and establish public wells, pumps and cisterns, hydrants and resevoirs, in the streets or elsewhere within said city, or beyond the limits thereof, for the extin-

guishment of fires and the convenience of the inhabitants, and to prevent the unnecessary waste of water. To have the exclusive control and power over the streets, alleys and public grounds and highways of the city, and to abate and remove encroachments or obstructions thereon; to open, alter, widen, extend, establish, regulate, clean or otherwise improve the same; to put drains and sewers therein, etc.; to establish, erect, construct, regulate and keep in repair bridges, culverts, and sewers, etc.; to establish and erect markets and market houses; to provide for the enclosing, regulating and improving of all public grounds and cemeteries belonging to the city, and to direct and regulate the planting and preserving of ornamental and shade trees in the streets, sidewalks or public grounds; to establish and regulate public pounds; to purchase, establish and regulate one or more cemeteries; to take and condemn land and real estate in said city to the public use, viz: for streets, alleys, and public ways; for extending, straightening and widening those streets now in use; for public squares, parks and pleasure grounds.

Art. 24 reads as follows: This act shall be deemed a public act, and may be read in evidence without proof, and judicial notice shall be taken thereof in all courts and places.

The provisions of the charter of the city of Brenham above set forth, clearly show that it was contemplated by the granting power, that said city should have the right to make extensive improvements for the benefit of the citizens thereof, requiring large outlays of money. It seems clear that it was also contemplated that such improvements should not be paid for out of the

current revenues received from taxation, but that the credit of the city might be used for such purposes. It is provided in Sec. 2 of the charter of the city of Brenham **"That the city council shall have power and authority to borrow for general purposes, not exceeding fifteen thousand ($15,000) dollars on the credit of the city.** Transcript p. 23.

**We maintain that the express power granted to the city of Brenham by its charter, carried with it the power to issue bonds for the amount so borrowed.**

This is not only true as a general proposition of law, but is peculiarly true of the city of Brenham, for it would have been impossible for said city to have made the improvements authorized by its charter, without the exercise of the charter authority to borrow money. The city of Brenham having the express authority to borrow money for general purposes on the credit of the city, certainly through its proper officers could have executed a negotiable promissory note for the money so borrowed. If this be conceded, then it is likewise true that said city of Brenham could have issued its negotiable coupon bonds for money borrowed for general purposes. Mr. Chief Justice Waite, in the case of New Providence vs. Halsey 117 U. S. 337, cites the case of Ackley School District vs. Hall 119 U. S. 135, wherein it is stated that a municipal bond in the ordinary form is a promissory note negotiable by the law merchant, within the meaning of the act of March 3. 1875.

The supreme court of the United States has repeatedly held, **that the power to borrow money carries with it the power to issue bonds.** Rogers vs. Burlington, 3 Wallace 654; Seybert vs. Pitts-

burg, 1 Wallace 372; Mitchell vs. Burlington, 4 Wallace 270.

It makes no difference, as said by Mr. Justice Clifford in the case of Rogers vs. Burlington above cited, whether the bonds as issued by the defendant (the city of Burlington) were sold in the market by their officers, or were first delivered to the company, and were by their agents sold for the same purpose. * * Technically speaking, it may be said that the transaction, as between the company and the defendants was, in form, a contract of lending, but as between the defendants and the persons who purchased the bonds in the market, it was undeniably a contract of borrowing money; and the same remark applies to this transaction in its practical and legal effect upon all subsequent holders of the securities, who have since become such for value, and in the usual course of business. Rogers vs. Burlington, 3 Wallace p. 667.

The supreme court of Texas in Dwyer vs. Hackworth 57 Texas 245, involving the validity of a tax levied to pay interest and provide a sinking fund on the bonds of the city, say: "It appears from the agreed statement of facts set out therein, that the city of Brenham, under its charter, had authority to borrow money for general purposes, **and did so borrow, by selling its bonds,** to the amount of $15,000." Counsel of plaintiff in error (in his brief, p. 23), seeks to weaken the force of this expression by the statement that the validity of these bonds was not in question in that suit. But it is a fact shown by the record in the present case, that the charter did authorize the city to borrow money, and that the city did borrow

money by selling its bonds, and the court held that the tax levied for paying interest and to provide a sinking fund was a legitimate tax and within the power of the city to impose. Mr. Dillon says that an "express power to a municipal corporation to borrow money includes the power to issue its negotiable bonds, or other usual securities." Municipal Corporations, Ch. VI, § 83. In Seybert vs. City of Pittsburg, 1 Wallace 272, it was held that where a city had authority to subscribe to the stock of a railway company, "as fully as any individual," it had authority to issue its negotiable bonds in payment of the subscription. The cases cited by plaintiff in error in his brief do not controvert or bring in question the proposition relied upon by defendant in error, that a corporation with **express power** to borrow money may exercise that power by the issuance bonds, but maintains an entirely different proposition, to-wit: that a municipal corporation, under an **implied** power to borrow money for municipal purposes in payment of its current expenses cannot borrow money and give therefor a negotiable security freed from equities that may be set up by the makers.

We will now review some of the authorities relied on by the plaintiff in error in support of its proposition, that the city of Brenham did not have authority under its charter to issue negotiable bonds: The case of Merrell vs. Montecello, 138 U. S. p. 673, is cited by plaintiff in error in his brief p. 18, as authority for denying the right of the city of Brenham to issue negotiable bonds, under the power conferred to borrow, for general purposes, not exceeding fifteen thousand dollars, on the credit of the city. In this case the statutes of Indiana

authorized towns to issue bonds for the purchase of lands and the erection of buildings for school purposes only. The bonds in suit were not issued for either of the purposes named, but were issued in May, 1878, to pay off bonds issued in May, 1869. The act which authorized the issue of bonds in 1869, required provisions for their payment to be made by the levy of a tax sufficient to pay the annual interest with an addition of not less than five cents on the one hundred dollars to create a sinking fund for the liquidation of the principal. The law of 1869 also prescribed the mode and time within which the bonds issued by its authority should be paid. The law of 1878 limited the authority to issue bonds to a particular purpose. Having provided the mode in which they should be paid, the city had no authority to issue bonds for that purpose, and on the contrary, the bonds authorized by the act of May, 1878, were limited to another purpose distinctly expressed. The question decided in this case is tersely stated in the syllabus as follows: "The **implied** power of a municipal corporation to borrow money to enable it to execute the powers expressly conferred upon it by law, if it exists at all, does not authorize it to create and issue negotiable securities to be sold in the market and to be taken by the purchaser freed from equities, which might be set up by the maker."

This case seems to be relied on above all others by the plaintiff in error in support of its main proposition, that the city of Brenham had no authority to issue bonds. The facts of this case differ widely from the facts of the Brenham case. In the Montecello case the general statutes of the state forbade the issuance of bonds by a

municipal corporation, such as Montecello is, except for the **purpose of buying grounds and building school houses thereon.** It was affirmatively shown that the bonds in question were not issued for either of these purposes, but for a purpose, that the general laws of the state, forbid the issuance of bonds for.

In the Brenham case it is shown that the city had authority to incur debts for many different general purposes, and that it had the **express** authority to borrow money on the credit of the city for general purposes, not to exceed fifteen thousand dollars.

There is an ordinance of the city of Brenham dated June 7, 1879, (Transcript p. 24) that authorized the issuance of fifteen thousand dollars of the bonds of said city for general purposes. The bonds were issued for general purposes as shown by the face of the bonds, (Transcript p. 26) and the same were sold by the proper officers of the city of Brenham and the proceeds thereof turned over to the city of Brenham.

There are other cases cited by Plaintiff in error on the question, that the city of Brenham had no authority under its charter to issue bonds. We do not believe the cases to be pertinent to the issue involved in this case, but we beg to comment on these cases, and state them as follows:

In Claiborne county vs. Brooks, 111, U. S. 400, the statute made it a duty of the county court to erect a court house, jail and other public buildings, for which purpose a special levy of taxes could be made. A county had no express authority to issue bonds to provide a fund for the above purpose. It was held that the authority to erect a court house did not authorize the

issuance of commercial paper as evidence or security for a debt contracted for that purpose.

In Mayer vs. Ray, 19. Wall 468, the city of Nashville issued checks in form negotiable drawn by the mayor and recorder of the city on the city treasurer. These checks were presented to the city treasurer and by him indorsed with his name and the date of his indorsement. They were then taken by the holder and were paid to the treasurer of the board of education of the city in discharge of school taxes. This officer then sold the checks and with the money discharged the salaries due by the city to the teachers of its public schools.

It was shown in evidence that the charter of the city did not confer express power to borrow money, and it was held that these checks were not commercial paper and that the holder took them subject to legal and equitable defences.

The majority of the court held that the power to borrow money does not belong to a municipal corporation as an incident of its creation. To be possessed it must be conferred by legislation, either express or implied.

In Police Jury vs. Britton, 15, Wall, 566, the law of Louisiana authorized the police jury to levy and collect a tax for levee purposes and to pay for work when finished by a warrant, payable to the contractor, which shall be a legal order upon the treasurer of the levee fund for the amount therein specified. To fund the debt contracted for levee purposes, the police jury issued coupon bonds payable to bearer, six years after date, or sooner, at the pleasure of the Parish.

It was held that the law above stated prescribed the manner in which payment for the work should be made, and the Parish had no implied authority to issue negotiable securities therefor.

II.

**The city of Brenham is not subject to the condition imposed by the constitution of 1876, requiring the levy of a tax sufficient to pay the current interest and to create a sinking fund of at least two per cent. thereon.**

It is stated in the petition that the city of Brenham is a municipal corporation duly chartered and incorporated by and under its charter, approved February 4, 1873. (Tran. p. 1.)

The answer of the defendant alleges that the city of Brenham is a municipal corporation of less than ten thousand inhabitants, incorporated on the 4th day of February, 1873, under the constitution and laws of Texas, with powers and privileges limited and restricted by the law of its immediate creation and the constitution of the state. (Tran. p. 6.)

It was proven that the city acts, and since 1873 has acted, under a special charter granted it in that year, and that said charter contains, among others, the following provision, under which the power to issue the bonds hereinafter referred to, is claimed: Sec. 2. That the city council shall have the power and authority to borrow, for general purposes, not exceeding fifteen thousand ($15,000) dollars on the credit of the said city. (Tran. p. 23.)

Sec. 4, 5, Art. 11 of the constitution of 1876, reads as follows: Sec. 4. Cities and towns having a population of ten thousand inhabitants or less, may be chartered alone by general law. They may levy, assess and collect an annual tax to defray the current expenses of their local government; but such tax shall never exceed, for any one year, one-fourth of one per cent, and shall be collectable only in current money. * * *

Sec. 5. Cities having more than ten thousand inhabitants may have their charter granted or amended by a special act of the Legislature, and may levy, assess and collect such taxes as may be authorized by law, but no tax for any purpose shall ever be lawful, for any one year, which shall exceed two and one-half per cent of the taxable property of such city; and no debt shall ever be created by any city, unless at the same time provision be made to assess and collect annually a sufficient sum to pay the interest thereon and create a sinking fund of at least two per cent thereon.

Sec. 7, Art. 11. All counties and cities bordering on the coast of the Gulf of Mexico are hereby authorized upon a vote of two-thirds of the tax payers therein (to be ascertained as may be provided by law) to levy and collect such tax for construction of sea walls, breakwaters or sanitary purposes as may be authorized by law, and may create a debt for such works and issue bonds in evidence thereof. But no debt for any purpose shall ever be incurred in any manner by any city or county unless provision is made at the time of creating the same for levying and collecting a sufficient tax to pay the interest thereon and provide at least two per cent as a sinking fund, and the condemnation of the

right-of-way for the erection of such works shall be fully provided for.

The cities referred to in the constitution are cities chartered by general law, and cities of over ten thousand inhabitants with charters granted or amended by special acts of the Legislature, and cities bordering on the Gulf of Mexico.

Cities having less than ten thousand inhabitants were permitted to accept the provisions of the general law relating to the incorporation of cities, and when the proper evidence of such acceptance is filed in the office of the County Clerk, the provisions of the general law applied to such city, "and all acts theretofore passed incorporating such city, which may be in force by virtue of any existing charter, shall be repealed from and after the filing of the said copy of these proceedings as aforesaid." (Revised statutes, Art. 349, Ed. of 1879.)

The amendment of April 6, 1881, 17 Leg., p. 113, contains substantially the same provisions. But the city of Brenham has not accepted the provisions of the statute, and has continued to exercise the power granted by its special charter. The charter grant of power to the city of Brenham to borrow fifteen thousand dollars for general purposes, is not in terms limited by the constitution of this state, and these limitations or conditions have not been applied by the Supreme Court of this state to any city which was by its special charter granted before the adoption of the constitution of 1876, specially empowered to borrow a specified sum of money. The following cases are referred to by the plaintiff in error and we beg to review them too: In Waxahachie vs. Brown, 67 T. 519, the town of Waxahachie was in-

corporated by a special act of the Legislature, April 28, 1871. That act did not confer upon the town the right to borrow money. In 1884 the town accepted the provisions of the act of 1879, authorizing it to take exclusive control of public schools. It was held that its power after that date to borrow money was subject to the general provisions of the constitution and statutes relating thereto.

In Gould vs. city of Paris, 68 T. 511, it does not appear when or how the city of Paris was incorporated, or what were the powers conferred upon it. The debt was contracted February 10, 1877, and presumably its authority to contract debts was derived from the constitution and laws then in force.

In city of Terrell vs. Dessaint, 71 T. 770, and Citizens National Bank vs. city of Terrell, 78 T. 450, the debts were contracted in 1883 and 1885. There was no evidence that the city of Terrell had under a charter granted prior to the adoption of the constitution, power to borrow money.

It is said by Mr. Cooley that a constitution should operate prospectively only, unless the words employed show a clear intention that it should have a retrospective effect. (Constitutional Limitations.)

We do not belive that it was intended by the framers of the constitution to affect the power granted by special charter to the city of Brenham by the Legislature, by imposing the conditions upon the charter claimed by the plaintiff in error. It seems clear to us that it was the intention of the framers of the constitution not to interfere with cities acting under special charters theretofore granted. In our judgment the limitations claimed

by the plaintiff in error apply only to the class of cities named in the particular article, in which such limitation is fixed.

But should it be held that the limitations of the constitution of 1876 apply to the city of Brenham, then we submit.

III.

**That the debt contracted by the city of Brenham, by the issuance of its bonds to the amount of fifteen thousand dollars, is within the limitations prescribed, by the constisution of 1876.**

**That the city of Brenham having the power to issued said bonds, it is to be presumed in an action of debt against the city by an innocent holder of said bonds, that said bonds were regularly issued and in compliance with the requirements of the law.**

On the question of the power of cities to issue bonds, the Supreme Court of Texas in the case of the Citizens Bank vs. the city of Terrell, 78 T. 457, says: "The constitution in effect commands that a city with less than 10,000 inhabitants shall, in order to create a debt, take its latest assessment of property for taxes and from that ascertain how much money a tax of 25 cents on $100 of valuation will produce, and it may create a debt, that that amount will provide for the payment of the interest on and 2 per cent. per annum additional."

While the language of the Supreme Court of Texas, in the case referred to, is general, yet the facts show that the particular city referred to was one incorporated under the general laws of Texas after the adoption of

the constitution of 1876, containing the restrictive clause referred to. But it cannot be maintained that the city of Brenham's rights and powers, under its special charter, are less than the rights and powers of cities operating under the general laws of Texas.

And it is only fair to concede, that if the test of the amount of bonds that cities acting under the provisions of the general laws, could issue, has been correctly stated by the Supreme Court of Texas, then it must be admitted, that the city of Brenham is not affected by any rule more onerous than this.

It affirmatively appears from the record, that the taxable values of the city of Brenham at the date of the issuance of the bonds, based on its last assessment of property for taxes, **was more than sufficient to provide a fund to pay the interest and create the sinking fund,** as tested by the rule laid down by the Supreme Court of Texas.

The assessed valuation of the property of the city of Brenham as shown by the latest assessment preceeding the issuanceof the bonds was $1,050,000

| | |
|---|---|
| Tax of 25 cents on the $100 yields | 2,625 |
| Int. on debt 10 per cent per annum | 1,500 |
| Sinking fund 2 " " " " $300 | |
| Total | 1.800 |
| Excess of tax over and above interest and sinking fund $825.00 | ~~$300.00~~ |

Record p. 27.

The plaintiff in error arrives at a different result by adding the current expenses of the city to the interest and sinking fund, making the aggregate expenses of the city to amount to $4,590. But the constitution does not

require that payment of the current expenses of the city, out of the property tax should also be provided for. The city has other sources of revenue than the tax on property

The city of Brenham had authority to levy an occupation or license tax upon every trade, profession, calling or other business, amounting to thirty different callings or pursuits. See act of Feb. 4, 1873.

The record in this case (p. 27) shows that these taxes amounted for the year 1879, to the sum of $1965.

In the case of Gelpcke vs. City of Dubuque, 1 Wallace 175, it is held when a corporation has power to issue negotiable securities, a bona fide holder has a right to presume that they were issued under circumstances which gave the authority, and they cannot be impeached for any infirmity.

In the case of Bissell vs the city of Jefferson 24 Howard 287 it is said: Where bonds recite that they were issued pursuant to law, it cannot be set up against a bona fide holder that the taxable value of the property of the township, was not sufficient to authorize the bonds to the amount for which they were issued.

It must be admitted that the defendant in error, is a bona fide holder for value and before maturity of the coupons sued on. Neither can it be disputed that the city of Brenham had taxable values sufficient at the date of the issuance of the bonds to have justified the creation of the whole bonded indebtedness, then created by the city of Brenham. It is therefore not necessary for this court to go to the full length, of the rule laid down, in the case of Bissell vs. the city of Jefferson cited above.

IV.

**The city of Brenham having authority**

**under its charter to borrow money and issue negotiable bonds therefor, and it appearing in evidence that its taxable values were sufficient to authorize the issuance of bonds to the amount of $15,000, as permitted by its charter, the fact, (if such be the fact) that no provision was made for the levy and collection of an annual tax for the payment of the interest and sinking fund, is a matter of defence to an action on the coupons of the bonds by a holder for value.**

The plaintiff in error urges as a ground of reversal, that it was not affirmatively shown by defendant in error, that provision for the payment of the debt incurred was made by the levy of a tax therefor, before the issuance of the bonds.

It is a sufficient answer to this proposition that a tax of one-fourth of one per cent on the valuation of the taxable property of the city of Brenham, as shown by its last assessment roll, was sufficient to pay the current interest and create a sinking fund as required by law, and the presumption exists that at or before the time the bonds were issued, provision was made for the payment of the debt as required by the constitution, if the constitution did require it, and the burden of allegation and proof rests upon the defendant in ~~error~~ Court below to rebut said presumption.

This presumption is supported by Sec. 7 of the ordinance relating to the issuance of the bonds in question, (Transcript 24.) It authorizes the printing and negotiation of the bonds, and **appropriates** out of the general ad-valorem tax of the city one eighth of one per cent. to pay the interest and sinking fund on the bonds, the same to be kept separate from the other funds of the

city and to be used for no other purpose.

The ordinance authorizing the issue of bonds was adopted and took effect June 7, 1879. (Transcript q. 25.) The bonds were issued July 31, 1879, and the interest was payable semi-annually, on the first days of September and March. (Transcript p. 14.)

Under the general laws of this state then in force the assesment of taxes was made between the first day of January and the first day of June of each year, and it may be presumed in support of the action of the city council that the assesment roll for the year 1879 was before them, and that after appropriating out of the amount thus assessed sufficient to pay the first coupons, provision was also made to assessand collect annually a tax sufficient for the payment of the interest and sinking fund as required by law.

This presumption is supported by the general charge of the court to the jury. The court after stating the facts in evidence, including the ordinance authorizing the issuance of bonds, uses the following language: "I charge you that the ordinance read for you, **in connection with other ordinances that I shall not read to you,** shows a substantial and sufficient compliance with the law, and on this defense you will find for the plaintiff (Transcript p. 20.) No exception to the statement of the facts in this charge is found in the record.

The presumption exists in favor of the holders of the bonds for value, and without notice that there has been a substantial compliance with all of the requirements of the law, and in this respect there is no difference between public and private corporations.

In Royal British Bank vs. Turquand, 5 Ellis and

Blackburn, 259( 85 Eng. Common Law Reports 246)the action was based on the bonds of a joint stock company; signed by two directors under the seal of the company. It was objected to the bonds that the directors had no authority to borrow money on bonds unless thereto authorized by a resolution of the Board. It was held that the production of the bond made a **prima facie** case for the plaintiff, and that it was incumbent on the defendant to show that the bond was unlawful and void

This case is cited with approval in St. Joseph Township vs. Rogers, 16 Wallace, 644, when it was held that the recital in the bond executed by a municipal corporation of a fact within the jurisdiction of the officer issueing it, to determine, was conclusive in favor of a holder for value and without notice.

In Gelpeke vs. city of Dubuque, 1, Wall 175; Moran vs Miami county, 2 Black 725; Supervisors vs. Shenck 5 Wall, 784; Mayer vs. Lord, 9 Wall 414; City of Lexington vs. Butler, 14 Wall 296; it is held that when a corporation has power to issue, negotiable securities, the **bona fide holder has a right to presume they were issued under the circumstances which gave the requisite authority.**

In commissioners of Knox county vs. Aspinwall 21 How, 539, the state authorized county commissioners to subscribe for railroad stock and issue bonds therefor, in case a majority of the voters of the county should so determine after a certain notice should be given of the time and place of the election, and the board subscribed for the stock and issued the bonds, purporting to act in compliance with the statute. If was held too late in a suit on the coupons of the bonds so issued to call in

question the existence or regularity of the notices in a suit against them by the holders of the coupons, who were innocent holders.

The presumption that the election which gave authority to issue the bonds was legally held, was conclusive in favor of such holders.

In Marcy vs. Township of Oswego, 92, U. S. 637, the action was on coupons attached to bonds issued by the township of Oswego under an act of the legislature of Kansas limiting their issue to an amount not above such a sum as would require a levy of more than one per cent per annum on the taxable property of such townships to pay the yearly interest. There was no recital in the bond as to the value of the taxable property and therefore the question of of **estoppel** did not exist.

It was held that the officers designated to execute the bonds were invested with power to decide whether the contingency had happened, or whether the fact existed which was a necessary precedent to any subscription or issue of bonds, and their decision was ~~final~~ conclusive in a suit by the **bona fide** holder of the bonds that the requirements of the legislative act had been complied with, ~~is conclusive,~~ and this is more emphatically true when the fact is one peculiarly within the knowledge of the persons to whom the power to issue the bonds had been conditionally granted, and see County of Clay vs. Society for Savings, 104 U. S. 579, in which it is held that in a suit between a municipal corporation and the **bona fide** holder of its bonds regular upon their face, they are **prima facie** evidence of the regularity of everything requisite for the proper issuance of such bonds.

In Humbolt Township vs. Long 102, U. S. 642, the decision in Marcy vs. Township of Oswego is adhered to. In the former case (102 U. S. 642) it appears that the assessment rolls were offered to show that the bonds were invalid by reason of their having been voted and issued in excess of the statutory limit, and it was held that this fact could not be set up against a **bona fide** holder of the bonds, in face of the decision of the board and their recital that the bonds were issued persuant to and in accordance with the act of 1879.

In the case at bar the bond recites that it is **authorized** by ordinance of the city of Brenham approved June 7, 1879, and it is presumed that the law permiting the issuance of the bonds under the ordinance was complied with. If the position of plaintiff in error is correct, then to authorize the issuance of the bonds there must have been a cotemporaneous or prior ordinance providing for the levy of a tax, and in the absence of proof to the contrary, the presumption exists that the directions of the statute had been complied with and that the officers of this city had done their duty in the premises.

In Gould vs. City of Paris, 68, T. 511, and City of Terrell vs. Dessaint, 71 T. 770, cited on page 30 of the brief of plaintiff in error, it is shown affirmatively that the requirements of the constitution and laws had not been complied with. In Citizens bank vs. City of Terrell 78, T. 450, the bonds were held valid for the amount authorized by the taxable values.

In Gould vs. City of Paris 68, T. 511, the following facts appear. Paris was a city of less than 10,000 inhabitants. It not appearing to have a special charter prior to 1876 it is to be presumed that its power of

taxation for general purposes was limited by the constitution of 1876 to twenty-five cents on the hundred dollars of valuation for current expenses. In 1877 the city contracted a debt, issuing eighteen bonds therefor, each for $250, due ten years after date, with eight per cent interest, payable annually. To provide for the payment of this debt the city levied a special annual tax of one-tenth of one per cent in addition to the twenty-five cents authorized by law on the assessed value of its taxable property, and specially stipulated in the ordinance that no part of twenty-five cents authorized by law should be used for the payment of the bonds and coupons. On the face of the ordinance creating the debt it appeared that the tax levied was **ultra vires** and no provision being made for the payment of the debt it was absolutely void.

In the City of Terrell vs Dessant 71, T. 770, the city council authorized the execution of the notes of the city payable in one and two years from their date. It was affirmatively shown that no provision was made for the payment of the interest and for the sinking fund. There was nothing in the record to show that the city of Terrell was acting under a special charter. The court held that the obligations were void, because it was affirmatively shown that no provision had been made for the payment of interest or for the sinking fund as required by the constitution of the state. The facts of this case are in no manner similar to the one at bar.

In San Antonio vs. Lane 35, T. 405, it is held by the supreme court of Texas that bonds and coupons attached issued by a municipal corporation are negotiable instruments transferable by delivery, and therefore a

**bona fide** holder cannot be held responsible for any misconduct or default of the parties issuing them, **for such holder may well presume that every condition precedent to their lawful issuance has been complied with by such parties.**

In Citizens Bank vs. City of Terrell 78, T. 450, the issuance of bonds was authorized by an ordinance of December 12, 1883, for the sum of $28,000 at the rate of seven per cent interest. The bonds were issued on the seventh of July, 1884. The assessed value of taxable property within the city was $749,363 for the year 1883, and was $908,976 for the year 1884. It was held that the ordinance of December 12, 1883, was valid for such an amount as a tax of twenty-five cents upon the hundred dollar valuation, according to the last taken assessment of the taxable values of the city would provide for. If the bonds were delivered at different dates those first delivered up to the amount of the debt that the city could lawfully create, should be paid, and the remainder of them should be treated as nullities, citing Davies county vs. Dickson, 117, U. S. 657. If all of the bonds under this ordinance were delivered at the same time so that none of them have priority over the others, the amount of valid debt should be distributed equally between said bonds, citing McPherson vs. Foster, 43, Iowa 72.

V.

**The resolution of the city council of Brenham which authorized the issuance of bonds provided that the city shall have the right to redeem said bonds at any time after**

**five years from date. The bonds issued were made redeemable in ten years, and it is objected by the plaintiff in error that they are void by reason of this variance.**

(Brief of plaintiff in error, p. 24.)

To this objection, defendant in error, replies: **that the error in respect to the time within which the bonds are redeemable is an irregularity which the obligor is estopped from asserting.**

1. The bond recites on its face that it is authorized by an ordinance of the City of Brenham, approved June 7, 1879. It may be presumed that there was another ordinance authorizing the bonds to be made payable as recited. There is no evidence to the contrary.

2. The bonds bear date of July 31, 1879. On the 18th of August, 1879, the mayor reported to the city council the sale of the bonds, stating to whom they were sold, and the amount realized from the sale. At that date bonds of the amount of $3,000 were deposited with Giddings & Giddings for safe keeping. (Transcript p. 31-33.) On the same day the blank coupons No. 1, which had been cut from the bonds **before** selling were ordered to be destroyed. (Transcript p. 33.)

3. By an ordinance of September 17, 1879, the sum of $10,000 realized from the sale of the bonds was appropriated for the purpose of opening a street, over which the right of way was granted to a railway, and for other purposes. (Transcipt pp. 33, 34 and 35.)

4. $3,000 of the bonds issued under the ordinance of June 7, 1879, were used by the city for fire department purposes. (Transcript p. 35.)

5. All the coupons on the bonds up to and includ-

ing September 1, 1882, were paid by the city of Brenham. (Transcript p. 37.)

6. On the 21st of March, 1884, the financial committee reported to the city council of Brenham its annual statement, showing its liabilities, bonds of 1879, to be $15,000, accrued interest $3,750.

7. It appears that the coupons of the bonds issued by the City of Brenham became the property of the defendant in error on the 12th day of June, 1884. (Transcript p. 26.)

In McCoy vs. Briant, 53, Cal. 247, cited in appellants brief p. 25, bonds were issued by the officers of a municipal corporation without any resolution authorizing them to do the act. It was held that bonds issued without the passing of a resolution authorizing the issue of any bonds were void.

On the contrary, in cases where the corporation was authorized to issue bonds, and bonds have been issued and the proceeds have been received and used by the corporation, the law interposes an estoppel, and will not permit the validity of the contract to be called in question. Argenti vs. City of San Francisco 16, Cal. 256.

In Supervisors vs. Schenck 5, Wallace 772, an objection to municipal bonds was made on the ground that the election by which the power to issue bonds was confirmed was ordered by the county court, and not by the supervisors of the county as required by law. It was held that the levy of a tax and payment of interest by the proper authorities validates the bonds in the hands of **bona fide** holders for value. "Judge Story said there was no maxim where it does not prejudice the rights

of strangers, better settled in reason and law than *Omnis ratehabitir retrotrahitur et mandato priori aequiperatur*, and it is equally well settled that the maxim is as applicable to corporations in matters of simple contracts as to other contracting parties. Questions of ratification most frequently arise in respect to the acts or omisions of agents, but the general rule is the same in all cases where the act done was one which it was competent for the party attempted to be charged to do. When the principal, upon a full knowledge of all the circumstances of the case, deliberately ratifies the acts, doings or omissions of his agent, he will be bound thereby as fully to all intents and purposes as if he had originally given him direct authority in the premises to the extent which such doings or omissions reach.

To the same effect is County of Clay vs. Society for Savings 104, U. S. 579, holding that the fact that taxes had been levied to pay interest, and interest had been paid for several years of itself covers irregularities in the issuance of bonds.

The ratification of the bonds by the city council of Brenham is shown by the following facts of record:

The ordinance of June 7, 1879, providing for the issuance of the bonds by section 6, authorized the mayor and finance committee of the city to negotiate the sale of the bonds as required. (Transcript p. 24.)

The bonds bear date July 31, 1879. (Transcript p. 48.)

On the 18th ot August, 1879, the mayor reported the sale of bonds of the face value of $12,000, of which $5,000 were sold to Mensing and $3,000 remained on hand.

Bonds of this issue were used by the city for fire department purposes. (Transcript p. 35 )

All the coupons on the bonds up to and including September 1st, 1882, were regularly paid. (Transcript p. 37.)

At a meeting of the city council March 21, 1884, the financial committee presented its annual statement showing among other things bonds of 1879, $15,000, accrued interest $3,750.

On the 21st of April, 1884, C. C. Garrett, Esq., city attorney and one of the aldermen of the city, wrote to Henry Sayles, Esq., one of the attorneys of defendent in error, stating that the city council recognized the validity of the bonds and will pay them. (Transcript p. 38 and 42.)

On the 4th of September 1875, Mensing bought from the plaintiff in error $5,000 of the bonds in issue at 95 cents on the dollar. August 10, 1880, and September 5, 1882, the remainder of the issue was purchased by him.

On June 12, 1884, he deposited with the bank of defendant in error, as collatteral security for a loan of $10,000 and future advances, $10,000 of the bonds inclusive of the bonds to which were attached the coupons upon which this suit is based, excepting three of the coupons deposited which were detached from bonds deposited with another party. (Transcript p. 26.)

## VI.

It is suggested by counsel for the plaintiff in error in his brief that Arts. 421 and 423 of the Revised Statutes requiring the registration of bonds by the comp-

troller, applies to the bonds, the subject matter of this suit, and while he does not insist that such is the case he bases an argument upon that assumption. (Brief p. 48.)

These articles are a part of Title 17, Revised Statutes relating to cities, towns and villages, which are incorporated under its provisions. Article 340 of this Title provides the mode in which cities may be incorporated and how incorporated cities may accept its provisions. Article 341 of this Title reads as follows: The provisions of this Title shall not apply to any city until such provisions have been accepted by the city council in accordance with the preceding article.

Brenham is a municipal corporation, incorporated on the 4th day of February, 1873, under the constitution and laws of Texas, with powers and privileges limited and restricted by the law of its immediate creation and the constitution of the state. (See plea in statement of plaintiff in error. Transcript pp. 8-9.)

Brenham was incorporated by a general law, Act of February 4, 1873. Its charter authorizes it to borrow money for general purposes and does not require the registration of its bonds. The provisions of Title 17 do not apply to bonds issued by the City of Brenham, as expressly declared in Art. 341 of the Revised Statutes.

It is not therefore necessary to discuss the effect of a non-compliance with the provisions of the Revised Statutes relating to the registration of bonds.

It is respectfully submited that the judgment of the lower court should be affirmed.

HENRY SAYLES,
Counsel for Defendant in Error.

IN THE

# Supreme Court of the United States.

OCTOBER TERM, 1891.

THE CITY OF BRENHAM, Plaintiff in Error,

*vs.*

THE GERMAN-AMERICAN BANK, Defendant in Error.

No. 120.

**In Error to the Circuit Court of the United States for the Western District of Texas.**

## ADDITIONAL BRIEF FOR DEFENDANT IN ERROR.

The defendant in error does not contend that the power to issue bonds comes alone from the authority conferred upon the city of Brenham by its charter to establish, erect, construct, regulate, and keep in repair bridges, culverts, and sewers, etc.; to establish and erect markets and market houses; to provide for the inclosing, regulating, and improving of all public grounds and cemeteries belonging to the city, and to direct and regulate the planting and preserving of ornamental and shade trees in the streets, sidewalks, or public grounds; to establish and regulate public pounds; to purchase, establish, and regulate one or more cemeteries; to take and condemn land and real estate in said city to the public use, viz., for streets, alleys, and public ways; for extend-

ing, straightening, and widening those streets now in use; for public squares, parks, and pleasure grounds, etc.

Charter City of Brenham, Special Laws, 1873.

But the charter of the city of Brenham goes further, and expressly authorizes the city council to borrow money. This clause of the charter reads as follows:

"The city council shall have the power and authority to borrow, for general purposes, not exceeding fifteen thousand dollars, on the credit of the city."—Art. 3.

In all the cases relied on by counsel representing the city of Brenham, in which the power to issue bonds have been denied, the authority to issue bonds was claimed from the *implied* authority to create a debt.

We need not contend that the power to borrow money belongs to a municipal corporation as an incident of its creation, but it is sufficient for this case to say, that the city of Brenham had express authority, under its charter, to borrow money on the credit of the city to the extent of fifteen thousand dollars.

We contend that in this case that the power to issue bonds necessarily follows the authority to create the debt.

Rogers *v.* Burlington, 3 Wallace, 654;
Seabert *v.* Pittsburg, 1 Wallace, 272;
Milner *v.* Pencola, 2 Woods, 632;
Portland Savings Bank *v.* Evansville, 25 Fed. Rep., 389;
Looney *v.* City of Galveston, 54 T., 517;
Lynd Co. *v.* Wenebargo, 16 Wallace, 6;
Dulon Municipal Corporations, 2 vol., 507;
Gause *v.* City of Clarksville, 5 Dill., 165;
Mayer *v.* Inman, 57 Ga., 320;
Vicksburg *v.* Lombard, 51 Miss., 111.

On the question of the power to issue bonds, the Supreme Court of Texas, in the case of Waxahachie *v.* Brown, 67 Tex., 519, say:

"The right of cities and towns having ten thousand inhabitants or less, to issue bonds, being neither granted nor prohibited, was evidently left to the intention of the legislature."

Afterwards, in the case of The Citizens Bank *v.* The City of Terrell, 78 T., 457, the Supreme Court of Texas say:

"The Constitution in effect commands that a city with less than 10,000 inhabitants shall, in order to create a debt, take its latest assessment of property for taxes and from that ascertain how much money a tax of 25 cents on $100 of valuation will produce, and it may create a debt, that that amount will provide for the payment of the interest on and 2 per cent. per annum additional."

In this case the right to issue bonds was recognized.

In the case of Dwyer *v.* Hochworth, 57 Tex., 250, which was an agreed case, involving the validity of a tax to pay the interest on the bonds involved in the suit, the Supreme Court of Texas say:

"It appears that the city of Brenham, under its charter, had authority to borrow money for general purposes, and did so borrow by selling its bonds to the amount of $15,000."

While it is not claimed that the decison of the Supreme Court of Texas in the Dwyer-Hochworth case is an authoritative decision of the validity of the bonds, yet we refer to it and the other Texas cases to show that the courts of Texas recognize the right of the municipal corporations of that State to issue bonds—and the Dwyer case is also authority for the position that the courts of Texas recognize the right of cities incorporated prior to the adoption of the existing State constitution to exercise the charter powers theretofore conferred.

All the authorities that have come to our attention maintain the proposition that the express authority to create a debt carries with it the necessary incident, the execution of an obligation, as the evidence of such indebtedness.

> Daniel on Negotiable Instruments, ed. 1891, vol. 2, p. 248, sec. 1527*a*, 4th clause, and authorities cited in note.

The usual evidence of indebtedness given by a municipal corporation is a bond.

> Authorities cited above.

To show the legislative intent, we beg to call the attention of the court to Art. VII, Sec. 1, of the charter of the city of Brenham, special laws of Texas, 1873, which reads as follows: "*Bonds of the city of Brenham shall not be subject to tax under this act.*" It seems clear to us that this clause of the charter of the city of Brenham, following as it does the other clause of this charter, giving the authority to create a debt, is conclusive of the fact that it was intended by the granting power that the city of Brenham should have the authority and exercise the right of issuing its bonds. This clause of the charter of the city of Brenham, exempting its bonds from taxation, is in connection with the other clauses of the charter making provision as to the character of property within the limits of the city that should be taxed.

We think that the controlling point in the case before the court is, *did the city of Brenham have the power to issue bonds for general purposes?* If this right is conceded, then it seems manifest that the bonds, issued within the limit, are binding on the city; and that this is certainly true after such bonds have passed from the city of Brenham into the hands of purchasers for value and before maturity.

It seems to us that the only defence against negotiable bonds in the hands of an innocent holder is the one of power to issue them. It is said in Murray *v.* Lardner, reported in 2 Wall., p. 160, that municipal bonds are negotiable paper, and a purchaser for value before maturity takes them free from any infirmity in their origin. We construe that to mean all other infirmities except those which go *to the power* to issue. A purchaser of negotiable securities from a *bona fide* holder for value before maturity takes them freed from all infirmities in their origin.

Stoddard *v.* Kimball, 6 Cush. (Mass.), 469;
Allaire *v.* Hartshorne, 1 Zab., 665;
Williams *v.* Smith, 2 Hill (N. Y.), 301;
Chicopee Bank *v.* Chapin, 8 Met. (Mass.), 40;
Lay *v.* Wissman, 36 Ia., 305.

Where bonds purport on their face to have been issued in pursuance of law, the holder is not required to inquire as to the regularity of their issue.

Davis *v.* Kendallville, 5 Biss., 280;
Marsey *v.* Township of Oswego, 2 Otto, 637;
Lynde *v.* The County, 16 Wall., 6;
Miller *v.* Town of Berlin, 13 Blatch., 245;
Milner *v.* City of Pencola, 2 Woods, 632;
Walnut *v.* Wade (13 Otto, 683).

A *bona fide* purchaser of city bonds has a right to regard the recitals in the bonds as true, and is not bound to look further.

San Antonio *v.* Mehaffy, 6 Otto, 312;
Pollard *v.* Pleasant Hill, 3 Dill., 195.

Where the mayor and recorder of a city issue its negotiable bonds, reciting a compliance with the law, it is too late to maintain in defense that the mayor and recorder acted without authority when the city is sued on the bonds by a *bona fide* holder.

Larned *v.* Burlington, 4 Wall., 275.

It is also contended by counsel for the city of Brenham that the power to issue bonds is limited by the constitution of Texas adopted in 1876, and that bonds issued in excess of the constitutional limitation would not be binding on the city. Without admitting that this proposition is correct, permit us to again call the attention of the court to the rule laid down by the Supreme Court of Texas as applicable to those cities that incorporate after the adoption of the constitution of 1876. The city of Brenham at most can only be subject to this rule. The constitution in effect commands that a city with less than 10,000 inhabitants shall in order to create a debt take its latest assessment of property for taxes, and from that ascertain how much money a tax of 25 cents on $100 of valuation will produce, and it may create a debt; that that amount will provide for the payment of the interest on and 2 per cent. per annum additional.

Bank *v.* Jewell, 78 Tex., 457.

The city of Brenham had less than ten thousand inhabitants, but more than five thousand; and if it be true that its charter granted in 1873 is limited by the constitution of the State adopted in 1876, then, applying the rule laid down by the Supreme Court of Texas, what basis have we for the bonds?

The assessed valuation of the property of the city of Brenham, as shown by the latest assessment preceding the issuance of the bonds, was $1,050,000.

| | | |
|---|---|---|
| Tax of 25 cents on the $100 yields | | $2,625 |
| Interest on $15,000 bonds at 10 per cent. per annum | $1,500 | |
| Two per cent. in addition | 300 | |
| Total | | $1,800 |
| Excesss of tax over and above the interest and sinking fund | | $825 |

Thus applying the limitation of the constitution, which is most beneficial to the city of Brenham, and denying the unrestricted exercise of the charter right to issue bonds, it is clear that at the time of the issuance of the bonds, June, 1879, that the city of Brenham had the *power* to *issue* the amount of bonds as contended by the German-American Bank, defendant in error.

We contend, then, that the power to issue the bonds having been shown, it is to be presumed, in an action by a holder for value and before maturity against the city, that the bonds were regularly issued, and that the city of Brenham is estopped from setting up as against such holder any equities or informalities.

A party taking municipal bonds in good faith has a right to presume that if the public agents issuing them had legal authority to act, that they had fully complied with the requirements of that authority, and in an action thereon the municipality can not be heard to object to the regularity of its own proceedings.

Mayer *v.* The City of Muscatine, 1 Wall., 384.

We presume that it will not be contended that the German-American Bank is not the holder for value and before maturity of the coupons sued on. It is true that $2,250 of the coupons were overdue when they left the hands of Mensing and came to the German bank, but it will not be disputed that these coupons were not due at the time Mensing bought them.

This question of good faith and want of notice was submitted to the jury, who found their verdict in favor of the bank. (See the general charge of the court, pp. 18 and 19, transcript.) Verdict of the jury (Trans., p. 20.)

But following out the argument, we maintain that if the power exists to issue bonds, that a *bona fide* holder has a right to presume that they were issued under circumstances which gave the authority, and they can not be impeached for any infirmity.

Gelpake *v.* City of Dubuque, 1 Wallace, 175.

Purchasers are not required to look further than the bond.

Knox Co. *v.* Aspinwall, 21 Howard, 539.

Bonds are good in the hands of innocent purchasers, although there may be defects which would have invalidated the bonds in a direct proceeding before the same passed into innocent hands.

Mercer Co. *v.* Hackett, 1 Wallace, 83;
Daniel on Negotiable Instruments, ed. 1891, sec. 1537, and authorities cited in note 1.

It is contended by counsel for the city of Brenham, that even if the charter gave the power to issue bonds, no sufficient provision was made for the payment of interest and to create a sinking fund.

To this proposition we might content ourselves on the authorities cited, by replying, that it was not necessary for a purchaser for value and before maturity to look to this; that it was the duty of the city council of Brenham to make provision for the interest and sinking fund; and that it is conclusively presumed that the city council did make such provision. We are referred to the ordinance that authorizes the bonds, and it is urged that this ordinance provides an inadequate amount. There is no evidence that this was the only ordinance, but on the contrary, the charge of the court bears out the presumption that there were other ordinances. For after calling the attention of the jury to the ordinance referred to, the court uses this language:

"I charge you that the ordinance read for you, in connection with the other ordinances that I shall not read to you, show a sufficient and substantial compliance with the law."

It may be significant to mention, that the record shows the sale in 1879 of only $12,000 of the bonds (Tr., pp. 31

and 32). The record does not show when the remaining $3,000 were put in circulation. The Mayor of Brenham shows by his report under date of August 18, 1879, that $3,000 of the Brenham bonds were placed with Gedding & Geddings for safe keeping (Tr., p. 31).

The mayor also shows by this report that the interest on the bonds sold ($12,000) had been paid to September 1, 1879. Only the interest for the next six months, maturing March 1, 1880, had to be provided for, the coupons maturing September 1, 1879, having been cut off (Tr., p. 33).

| | |
|---|---|
| Say six months interest on $12,000 at 10 per cent... | $600 |
| Two per cent sinking fund..... | 240 |
| Total ..... | $840 |

But we find (Tr., p. 27), that one-eighth of 1 per cent. on the last assessment roll, the amount of the tax levied, produced $1,312.50, leaving an excess of nearly $500.

It may be contended, however, that provision should have been made for the interest and sinking fund on the whole issue of the bonds, to which we reply that the record shows that it was sufficient for the first year, and it is to be presumed that it was also sufficient for subsequent years. The record shows that all the coupons on the bonds up to and including September 1, 1882, were paid (defendant's bill of exception No. 4, Tr., p 37), and it is to be presumed that such interest was lawfully paid.

In answer to the position that the revenues of the city of Brenham, from *ad valorem* taxes, was not sufficient to pay the current expenses and to provide a sinking fund for the interest on the bonds, we may well reply: The law no where requires the other expenses of the city to be first paid. Besides, the city of Brenham had other sources of revenue. It had the right in addition to the property tax to collect a poll tax, the right to collect oc-

cupation taxes, and it also had many other sources of revenue.

See Charter of the City of Brenham, Special Laws of Texas, 1873.

Replying to the minor points made by counsel for the city of Brenham, we contend—

That the variance between the bonds and the ordinance, as to the date when the city should have the right to redeem, is a mere irregularity that the city is prevented from asserting after the sale of her bonds.

In the case of Mygatt *v.* The City of Green Bay, 1 Biss., 292, it is held that a city is estopped as against a *bona fide* holder to allege that the recitals in the bonds as to the rate of interest do not correspond with the resolution of the board of trustees authorizing the subscription.

In the case of Luling *v.* City of Racine, 1 Biss., 314, a city was authorized to issue bonds payable in twenty years.

The bonds were issued in March, 1853, and made payable in February, 1873. *Held*, in a suit for interest, that an objection that the bonds were made payable in less than twenty years was not tenable; that the city put its own construction upon the act, issued its bonds, paid interest on them, and received certificates of stock, and it was therefore estopped from denying the validity of the bonds.

It should be borne in mind that this is not an action on the part of the city of Brenham to redeem her bonds, but an action of debt against it on the past-due interest coupons. In this action the city of Brenham should not be heard to deny the validity of the debt, because of the variance stated; we might admit that the city of Brenham could redeem the bonds at the end of the five years, but this is a matter of election for the city to exercise. But even this might not be true as against the innocent

holder of the bonds. However, this right has never been denied and was specially extended to the city in the pleadings of the bank, defendant in error, before this court, (Tr., p. 14).

In answer to the suggestion that the bonds are void because the ordinance authorizing the bonds provides that the coupons may be used in payment of taxes, we reply:

First. That the bank, defendant in error, is an innocent purchaser, and had no notice of the ordinance.

Second. That if such provision of the ordinance is void, it does not affect the validity of the bonds, except that the coupons can not be used for the purpose of paying taxes; and that this is not a suit to compel the city of Brenham to accept the coupons in payment of taxes, but simply a suit for debt. A purchaser of bonds is not affected by the statements in the records contrary to the recitals in the bonds.

Mercer Co. *v.* Hackett, 1 Wall., 83;
Clay Co. *v.* Society of Savings, 104 U. S., 579;
Walnut *v.* Wade, 103 U. S., 683.

A point is made by counsel for plaintiff in error, that the bonds were not registered as required by the revised statutes of Texas. In this connection we will say, that the constitution and laws of Texas, and the decisions of the Supreme Court of Texas, recognize the right of cities and towns, incorporated by special laws, to continue their existence under such special charters. The provision of the statutes of Texas requiring the registration of bonds, laws of 1879, in the terms of the act itself, is limited to those cities that incorporate under the general laws of Texas. (Articles 340–341, Title 17, Revised Statutes of Texas.) Article 341 reads as follows:

"The provisions of this title shall not apply to any city until such provisions have been accepted by the city council in accordance with the preceding article."

Same article, section 7:

"All counties and cities bordering on the coast of the Gulf of Mexico are here by authorized, upon a vote of two-thirds of the taxpayers therein (to be ascertained as may be provided by law), to levy and collect such tax for construction of sea-walls, breakwaters, or sanitary purposes, as may be authorized by law, and may create a debt for such works and issue bonds in evidence thereof. But no debt for any purpose shall ever be incurred in any manner, by any city or county, unless provision is made at the time of creating the same for levying and collecting a sufficient tax to pay the interest thereon and provide at least two per cent. as a sinking fund; and the condemnation of the right of way for such works shall be fully provided for."

It seems clear that this section is limited to cities and towns on the seacoast that wish to build sea-walls, etc., and that it has no application to the city of Brenham.

Same article, section 8, authorizes State aid for sea-walls, etc., but we will not copy it as it is clearly inapplicable to this discussion.

We find in the revised statutes of Texas, 1879, similar restrictive clauses, but these clauses are specially limited to those cities that incorporate under the general laws, and to those that surrender their special charters and avail themselves of the provisions of the general laws. The city of Brenham did neither, but has always acted under a special charter, granted in 1873. But we believe the re-enactment of these restrictive clauses by the legislature to be a legislative construction of the constitution, and we will, therefore, copy the clauses of the general laws of Texas believed to have a bearing on this case.

Title 17, revised statutes of Texas, 1879:

"Article 340. Any city within the limits of this State, containing 1,000 inhabitants or over, may accept the provisions of this chapter in lieu of any existing charter, by a two-thirds vote of the city council of such city."

* * *

The article further provides how it is certified, returned, etc., and the steps necessary.

"Article 341. The provisions of this title shall not apply to any city, until such provisions have been accepted by the city council in accordance with the preceding article."

"Article 421. All bonds shall specify for what purpose they were issued." * * *

"Article 423. It shall be the duty of the mayor, whenever any bond or bonds are issued, to forward the same to the comptroller of public accounts of the State, whose duty it shall be to register said bond or bonds." * * *

"Article 425. The city council shall have power within the city by ordinance to annually levy and collect taxes not exceeding one-fourth of 1 per cent. on the assessed value of all real and personal estate and property in the city not exempt from taxation by the constitution and laws of the State."

"Article 427. No debt shall ever be created by any city unless at the same time provision be made to assess and collect annually a sufficient sum to pay the interest thereon and create a sinking fund of at least 2 per cent. thereon."

It is significant that all of the restrictive clauses in the laws are expressly limited to cities that incorporate under the general laws.

None of these clauses of the laws are applicable to the city of Brenham, and we fail to find any that are, except those contained in its special charter.

We submit that it was not the intention of the framers of the constitution or of the legislature of the State of Texas to interfere with the rights and powers of cities acting under special charters theretofore granted.

Before closing this argument we beg to suggest that bonds issued in a negotiable form involve questions relating to commercial securities, and whether such securities are valid or void, belongs to the dominion of gen-

eral jurisprudence. If there are any rulings of the Supreme Court of Texas adverse to the bonds (but we are not advised of any such rulings), then we would maintain that such rulings would not be respected by the United States Supreme Court, when not satisfactory to its judges, in the case of such bonds in the hands of a citizen of another State who is a *bona fide* holder.

Daniel on Negotiable Instruments, ed. 1891, vol. 2, p. 547, sec. 1526, and authorities cited.

We respectfully submit that there is no error in the judgment of the lower court and ask that it be affirmed.

Respectfully,

HENRY SAYLES,
*Of Counsel for the German-American Bank,*
*Defendant in Error.*

Houston

# TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1888.

No. ~~1126~~ ~~782~~ ~~1461~~ 120

THE CITY OF BRENHAM, PLAINTIFF IN ERROR,

*vs.*

THE GERMAN-AMERICAN BANK.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF TEXAS.

FILED SEPTEMBER 26, 1888.

# SUPREME COURT OF THE UNITED STATES.

## OCTOBER TERM, 1888.

## No. 1136.

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## THE CITY OF BRENHAM, PLAINTIFF IN ERROR,

*vs.*

## THE GERMAN-AMERICAN BANK.

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IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF TEXAS.

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1 In the Circuit Court of the United States for the Fifth Circuit and Western District of Texas, at Austin.

[The Seal of the U. S. Circuit Court, Western Dist. Texas, Austin.]

CITY OF BRENHAM, Plaintiff in Error,
*vs.*
GERMAN-AMERICAN BANK, Defendant in Error.

Honorable Aleck Boarman, district judge, presiding.

Be it remembered that at an adjourned term of the circuit court of the United States for the fifth circuit and western district of Texas, held at Austin, in April, A. D. 1888, Honorable Aleck Boarman, district judge, presiding, the following, among other, proceedings were had:

*Plaintiff's Original Petition. Filed Nov'r 8th, 1886.*

In the Circuit Court of the United States in and for the Western District of Texas, at Austin, Texas.

THE GERMAN-AMERICAN BANK
*vs.*
THE CITY OF BRENHAM. } No. 2092.

To the honorable the judges of the circuit court of the United States in and for said district:

The petition of "The German-American Bank," hereinafter styled plaintiff, complaining of "The City of Brenham," hereinafter styled defendant, respectfully represents—

That plaintiff is a corporation duly chartered and incorporated under the name and style of "The German-American Bank" by the laws of the State of New York, and is a citizen of and has its domicile and place of business in the city and county and State of New York.

That said defendant is a municipal corporation duly chartered and incorporated under the name of "The City of Brenham"
2 by the laws of the said State of Texas, and has its domicile in the county of Washington, in said State of Texas, in the district aforesaid, and is a citizen of said county, State, and district, having a common seal as a corporation and invested with all the powers and privileges usually granted by the laws of said State of Texas to municipal corporations, including the right and power to make contracts, sue and be sued, and by and under its charter, approved February 4th, 1873, and in force at the times and in the matters hereinafter stated, invested with and possessed of the right and power to borrow for the general purposes of said city and on the credit thereof a sum or sums of money not to exceed in the aggregate the sum of fifteen thousand dollars, and to secure the repayment of said sum or sums, with interest thereon, by the execution and sale and delivery of its negotiable bonds and coupons or other obligations or in any other manner chosen and adopted by its council.

That thereafter and at the times hereinafter stated and by virtue of the power aforesaid, duly exercised and for the purposes aforesaid, the said defendant, for value received, did make, execute, sell, and deliver to various and sundry persons and put in circulation in the markets on the respective dates thereof its ninety-two several bonds, signed by its mayor, M. P. Kerr, and by its secretary, C. H. Carlisle, and sealed by its corporate seal, each and all of said bonds being of date, to wit, the 31st day of July, 1879, and due twenty years after date, numbers one (1) to fifty (50), inclusive, thereof being for fifty dollars each; numbers fifty-one (51) to seventy-five (75), inclusive, thereof being for one hundred dollars each; numbers
3 seventy-six (76) to eighty-nine, inclusive, thereof being for five hundred dollars each, and numbers ninety (90) to ninety-two (92), inclusive, thereof being for one thousand dollars each—

Each of said bonds having been authorized by and issued and sold and delivered by defendant for the purpose aforesaid by an ordinance duly passed by it on June 7th, 1879.

That each of said bonds recites substantially that defendant is indebted to bearer in the sum therein specified, in lawful money of the United States, with interest from the date thereof, inclusive, at the rate of ten per cent. per annum, payable semi-annually on the first days of March and September of each year, on presentation of the proper coupons attached thereto, and that each of said bonds and said interest thereon are payable at the office of the treasurer of said defendant, and redeemable after ten years at the option of the defendant, and that said bonds and the coupons attached thereto were issued, executed, sold, and delivered and put in circulation under authority of an ordinance of defendant, approved June 7th, 1879, entitled "An ordinance to provide for the issue and sale of fifteen thousand dollars in coupon bonds of the city of Brenham to borrow money for general purposes," and each of said bonds has on the face thereof the following: "This bond is authorized by an ordinance of the city of Brenham, approved June 7th, 1879."

That said bonds at the said date of their said issuance, execution, sale, and delivery had attached thereto a number of coupons for interest accruing and to accrue thereon from their said dates,
4 respectively, inclusive, which were also duly executed and sold and delivered and put in circulation by defendant in like manner and with the bonds aforesaid at said date, respectively, and in that number were included six certain coupons attached to said bond number one for fifty dollars (they, the said coupons, being numbered from eight (8) to thirteen (13), inclusive), for two and $\frac{50}{100}$ dollars ($2.50) each, the first of said coupons, or number eight (8), due March first, 1883; the second, or number nine (9), due September first, 1883; the third, or number ten (10), due March first, 1884; the fourth, or number eleven (11), due September first, 1884; the fifth, or number twelve (12), due March first, 1885; the sixth, or number thirteen (13), due September first, 1885.

That to other fifty-dollar bonds aforesaid, numbered from two to thirty, inclusive, there were attached, respectively, a like number of coupons as to said bond number one, and in that number there were

attached to each of said bonds six (other) certain coupons numbered from eight (8) to thirteen (13), inclusive, respectively, and that each of said coupons on each of said bonds from number two (2) to number thirty (30), inclusive, are of the same amounts and mature at the same dates, respectively, as those before mentioned as belonging to said bond number one (1); that to said fifty-dollar bonds, from number thirty-one (31) to fifty (50), inclusive, respectively, there were attached to each five certain other coupons, numbered from eight to twelve, inclusive, respectively, and that each of said coupons on each of said bonds, from number thirty-one to fifty, inclusive, are respectively of the same amounts and mature, respectively, at the same date as those, to wit, from 8 to 12, inclusive, mentioned in said bond No. 1 and hereinbefore referred to.

5 That to said bond number fifty-one (51), for one hundred dollars, there was also attached five certain (other) coupons, numbered from eight (8) to twelve (12), inclusive, for five dollars each, the first, or number eight (8), maturing March 1st, 1883; the second, or number nine (9), September 1st, 1883; the third, or number ten (10), March 1st, 1884; the fourth, or number eleven (11), September 1st, 1884; the fifth, or number twelve (12), March 1st, 1885.

That to each of the said other one-hundred-dollars bonds, numbered, respectively, from 52 to 75, inclusive, there were attached, respectively, a like number of coupons as to said bond number fifty-one (51), and that said last-named coupons are of the same number and amounts, respectively, and mature, respectively, at the same dates as those hereinbefore referred to belonging to said bond No. 51.

That to said bond numbered seventy-six (76), for five hundred dollars ($500), there were also attached six certain (other) coupons for twenty-five dollars each and numbered from 8 to 13, inclusive, respectively, the first, or number 8, maturing March 1st, 1883; the second, or number 9, September 1st, 1883; the third, or number 10, March 1st, 1884; the fourth, or number 11, September 1st, 1884; the fifth, or number 12, March 1st, 1885; the sixth, or number 13, September 1st, 1885.

That to each of the said five-hundred-dollar bonds, numbered, respectively, from 77 to 89, inclusive, there were attached, respectively, a like number of coupons as to said bond number 76, and that said last-named coupons are of the same numbers and amounts, respectively, and mature, respectively, at the same dates as those hereinbefore referred to as belonging to said bond No. 76.

6 That to said bond numbered 90, for one thousand dollars ($1,000), there were attached five certain other coupons, for fifty dollars each, numbered from 8 to 12, inclusive, respectively, the first, or No. 8, due March 1st, 1883; the second, or No. 9, September 1st, 1883; the third, or No. 10, March 1st, 1884; the fourth, or No. 11, September 1st, 1884; the fifth, or No. 12, March 1st, 1885.

That to each of the other of the said one-thousand-dollar bonds, numbered, respectively, from 91 to 92, inclusive, there were attached, respectively, a like number of coupons as to said bond numbered ninety, and that said last-named coupons are of the same number

and amounts, respectively, and mature, respectively, at the same dates as those hereinbefore referred to as belonging to said bond number 90.

That at the time of the issuance, sale, and delivery and circulation of each and all of the bonds hereinbefore referred to there were attached to each of them, respectively, certain other coupons different from those hereinbefore mentioned and numbered from 1 to 7, inclusive, and that all of said other different coupons have heretofore been paid by defendant.

That the aforesaid coupon No. 8, which was attached to the aforesaid bond No. 1, for fifty dollars, is in substance and effect as follows:

"The City of Brenham will pay to bearer two dollars $\frac{50}{100}$ for six months' interest, due March 1st, 1883, at the office of the city treasurer, on bond No. 1.

"M. P. KERR, *Mayor.*

"C. H. CARLISLE, *City Secretary.*"

7 And that all of said coupons sued on herein are of same date, to wit, 31st July, 1879, and are in substance and effect of the same form as that above set forth, except as to the time of maturity, numbers, amounts, and number of bond to which attached; that in due course of trade and for a valuable consideration plaintiff became and is now the legal owner and holder of each and all of said bonds and coupons, and that plaintiff became such owner and holder in good faith and for a valuable consideration; that each of said bonds and coupons were transferred and delivered to plaintiff and those from whom plaintiff acquired the same for valuable consideration as aforesaid and long before the maturity of said coupons or any of them; that by reason of the premises aforesaid, to wit, the issuance, execution, and sale and delivery and circulation of its bonds and coupons aforesaid and the subsequent transfer and delivery thereof, for value as aforesaid, to plaintiff, the said defendant became liable and promised to pay to plaintiff or the bearer thereof the several sums of money therein mentioned, with lawful interest thereon, according to the tenor and effect thereof, whenever thereunto requested; but, although the sums of money shown by said coupons to be due have long been due and unpaid and said coupons have often been presented by plaintiff to defendant for payment, yet to pay said coupons or any of them (except those before mentioned) or any portion of any of them has the said defendant hitherto wholly failed and refused and still fails and refuses, to plaintiff's great damage, to wit, the full amount of said unpaid coupons, with interest on each of them from their said maturity, respectively, at eight per cent. per annum.

8 Wherefore plaintiff brings this suit, and prays that said defendant be cited to answer hereto, and that plaintiff have judgment against said defendant for its said debt, interest, and costs of suit.

DAVIS, DAVIDSON & MINOR,
*Counsel for Plaintiff.*

(Indorsed:) No. 2092. In the circuit court of the United States in and for the western district of Texas, at Austin. The German-American Bank *vs.* The City of Brenham. Original petition. Filed November 8th, 1886. Sam'l Hopkins, clerk, by W. E. Turner, deputy. Davis, Davidson & Minor, counsel for plaintiff.

*Defendant's Original Answer. Filed March 30th*, 1887.

In the United States Circuit Court, at Austin. At Law.

THE GERMAN-AMERICAN BANK
*vs.*
THE CITY OF BRENHAM. } No. 2092.

Comes now The City of Brenham, defendant in the above-entitled cause, and, protesting against the jurisdiction of the court, says that said plaintiff, The German-American Bank, is not the real and *bona fide* owner and holder of the coupons set forth in its petition and has no title thereto; but defendant says that G. H. Mensing, who is a citizen of Texas and resident of the county of Galveston, is the real owner of the said coupons, and that the transfer or delivery of said coupons by said Mensing to plaintiff was colorable only and for the purpose of enabling suit to be instituted thereon in this court; all of which defendant is ready to verify.

9 Wherefore defendant prays that this suit abate and be dismissed at the cost of plaintiff.

MAXEY & FISHER AND
PEELER & PEELER,
*Attorneys for Defendant.*

THE STATE OF TEXAS, *County of Washington:*

Before me, H. M. Lewis, a county clerk within and for said county and State, on this day personally appeared E. C. Abbott, who, being first duly sworn, deposes and says that he is the duly authorized agent of The City of Brenham, defendant in the above-entitled suit, and is authorized to make this affidavit; that the statements of fact set forth in the foregoing plea in abatement are true, to the best of his knowledge and belief.

E. C. ABBOTT.

Sworn to and subscribed before me this the 27th day of March, A. D. 1887.

H. M. LEWIS,
*Co. Clk Wash. Co., Tex.*

In the United States Circuit Court, at Austin. At Law.

THE GERMAN-AMERICAN BANK
*vs.*
THE CITY OF BRENHAM. } No. 2092.

The said City of Brenham, defendant in the above-entitled cause,

not waiving, but expressly relying upon its aforesaid plea in abatement and to the jurisdiction and only in the event that the same be considered insufficient and held for naught, demurs to the petition of plaintiff and says—

10 1. That said petition fails to show any warrant or authority for the defendant, under the constitution of Texas, to issue the bonds and interest coupons therein declared upon.

2. That petition is fatally defective because it does not specify for what purpose the bonds and coupons were issued, and discloses no facts which would authorize defendant to issue negotiable bonds with interest-bearing coupons.

Wherefore defendant prays judgement of the court.

MAXEY & FISHER AND
PEELER & PEELER,
*Attorneys for Defendants.*

And not waiving, but expressly relying upon the plea in abatement and to the jurisdiction above set forth, and only in the event that the same be considered insufficient and held for naught, this defendant, answering said petition, denies all and singular the allegations in the same contained, except such as may hereinafter be admitted, and requires proof thereof.

Specially answering, the defendant says—

1. That it is a municipal corporation, having a population of less than ten thousand inhabitants, incorporated on the 4th day of February, 1873, under the constitution and laws of Texas, with powers and privileges limited and restricted by the law of its immediate creation and the constitution of the State; that as such corporation it has no power now, nor did it have on the 7th day of June, 1879, to make, pass, or enact resolutions, ordinances, or by-laws repugnant to the constitution and laws of said State, but all such resolutions, ordinances, and by-laws must conform thereto or otherwise be invalid and inoperative; that under the provisions of the

11 State constitution, adopted in the year 1876, and prior to the passage of the ordinance of June 7th, 1879, in plaintiff's petition mentioned, cities and towns with a population of ten thousand inhabitants or less have authority to levy, assess, and collect an annual tax, in current money, to defray only the current expenses of their local government, and are without power to borrow money, issue negotiable bonds therefor, and collect taxes for the payment of the same. Wherefore defendant says that on said 7th day of June, 1879, no power existed in its said city council to pass the ordinance of that date, and all bonds and interest-bearing coupons which are issued in pursuance thereof are without validity and constitute no legal liability against it.

2. Further answering, defendant admits that the bonds specified in plaintiff's petition were signed by its mayor and secretary, and that the printing of the signatures to the aforesaid coupons was authorized by said mayor and secretary, but defendant says that neither the mayor nor secretary nor both of said officers was authorized to execute the said bonds and coupons, and defendant avers the same

were issued without authority of law and in direct violation of the said ordinance of June 7th, 1879, for this, that said ordinance authorized the execution and issuance of fifteen thousand dollars of bonds, payable twenty years after the date thereof, and to be redeemable, at the option of defendant, at any time after five years from their date, and the defendant avers that the supposd bonds described in plaintiff's petition can only be redeemed by defendant,
12 according to the recitals appearing upon their face, after the expiration of ten years from the date thereof. Wherefore defendant says that the execution and issuance of said bonds were wholly unauthorized, and the same are null and void.

3. Further answering, defendant says it is provided in section 4, article 11, of the constitution of the State of Texas that no county, city, or other municipal corporation shall become a subscriber to the capital stock of any private corporation or association or make any appropriation or donation to the same or in anywise loan its credit; that the prohibition in said article contained denied defendant the right to make an appropriation or donation to any railroad company or in anywise loan its credit in aid of or for the benefit of any railroad corporation; but, notwithstanding the constitutional restriction and inhibition above set forth, defendant says that its city council did, on the said 7th day of June, 1879, pass the ordinance above referred to, authorizing the issuance of fifteen thousand dollars of city bonds, redeemable after ten years from date thereof, three thousand dollars of which — for the benefit of the fire department of defendant and the remaining twelve thousand being in aid of the Gulf, Colorado and Santa Fé Railroad Company, in providing for the purchase of right of way over the streets of defendant and to the purchase of depot grounds in order to secure the construction of said railroad through the said city of Brenham; that said bonds so authorized to be issued for the railroad purpose aforesaid were sold by defendant to the following-named persons: Giddings & Giddings, $5,000; the said G. H. Mensing, $5,000, and to F. A. Engleke, $2,000;
13 that thereafter the said Mensing became the owner and holder of the bonds previously purchased by Giddings & Giddings and Engelke from defendant, and is now the real owner and holder of the same; that said Giddings & Giddings, Mensing, and Engelke purchased said bonds with actual and personal knowledge of the purpose for which they were issued, as well as record notice of such illegal purpose as disclosed by the public records and minutes of defendant's city council.

Wherefore defendant says that said bonds and interest-bearing coupons are null and void and constitute no legal charge against it.

4. Further answering, defendant says that if the plaintiff be the owner of said bonds and coupons it purchased the said coupons after their maturity and with knowledge of all the facts and circumstances attending the issuance of the same, well knowing they were issued to raise money for the purpose of enabling defendant to purchase the right of way and depot grounds for the Gulf, Colorado

and Santa Fé Railroad Company—an illegal purpose and one for which this defendant was not authorized to issue negotiable bonds.

MAXEY & FISHER,
PEELER & PEELER,
*Att'ys of Def'd't.*

(Indorsed:) No. 2092. The German-American Bank *vs.* The City of Brenham. Defendant's original answer. Filed March 30th, 1887. Samuel Hopkins, clerk.

*Defendant's Amended Original Answer. Filed April 24th,* 1888.

In the United States Circuit Court, at Austin. At Law.

THE GERMAN-AMERICAN BANK *vs.* THE CITY OF BRENHAM. } No. 2092.

14 Comes now The City of Brenham, defendant in the above-entitled cause, by attorney, leave of the court being first had and obtained, and amends its demurrers and answer heretofore filed in this cause.

The said defendant, not waiving but still insisting on its plea in abatement and to the jurisdiction and, in the event the said plea in abatement and to the jurisdiction be overruled, demurring to the petition of plaintiff, says that said petition is insufficient in law, because—

1. It does not specify the purpose for which said bonds and coupons were issued.

2. It does not appear therefrom that defendant was authorized by the constitution and laws of Texas to issue the alleged bonds and the interest-bearing coupons declared upon.

Wherefore defendant prays the judgment of the court.

MAXEY & FISHER,
PEELER & PEELER,
*Attorneys for Defendant.*

And defendant specially excepts to said petition because the ordinance of June 7th, 1879, of the city of Brenham is not therein set forth nor is the substance of said ordinance given.

Wherefore defendant prays judgment of the court.

MAXEY & FISHER,
PEELER & PEELER,
*Attorneys for Defendant.*

And should the said plea in abatement and to the jurisdiction be held insufficient, upon which defendant still relies, defend-
15 ant, in answer to said petition, denies all and singular the allegations in the same contained, except such as may be hereinafter admitted, and requires strict proof thereof.

Specially answering, the defendant says—

1. That it is a municipal corporation, having a population of less than ten thousand inhabitants, incorporated on the 4th day of February, 1873, under the constitution and laws of Texas, with powers and privileges limited and restricted by the law of its immediate creation and the constitution of the State; that, as such corporation, it has no power now nor did it have on the 7th day of June, 1879, to pass or enact resolutions, ordinances, or by-laws repugnant to the constitution and laws of said State, but all such resolutions, ordinances, and by-laws must conform thereto or otherwise be invalid and inoperative; that under the provisions of the State constitution, adopted in the year 1876, and prior to the passage of the ordinance of June 7th, 1879, in plaintiff's petition mentioned, cities and towns with a population of 10,000 inhabitants or less have authority to levy, assess, and collect an annual tax in current money to defray only the current expenses of their local government, and are without power to borrow money, issue negotiable bonds therefor, and collect taxes for the payment of the same. Wherefore defendant says that on said 7th day of June, 1879, no power existed in its city council to pass the ordinance of that date, and all bonds and interest-bearing coupons which were issued in pursuance thereof are without validity and constitute no legal and subsisting liability against it.

16 2. Defendant admits that the bonds specified in plaintiff's petition were signed by its mayor and secretary, and that the names of the mayor and secretary were printed on the coupons, and defendant says that the ordinance authorizing such printing of the signatures of the mayor and the secretary was illegal and void and the bonds issued thereunder invalid.

3. The ordinance aforesaid was further invalid and the bonds issued thereunder void, because the ordinance failed to provide for the payment of the interest on said bonds and to provide an adequate sinking fund for the payment of said bonds, as required by the constitution and laws of the State.

4. The said ordinance was further invalid in that it authorizes the coupons attached to said bonds to be received in payment of taxes, in direct contravention of the constitution and laws of the State.

5. Defendant further says that neither the mayor nor secretary nor both of said officers was authorized to execute the said bonds and coupons, and defendant avers the same were issued without authority of law and in direct violation of the said ordinance of June 7th, 1879, for this, that said ordinance authorized the execution and issuance of fifteen thousand dollars of bonds, payable twenty years after the date thereof and to be redeemable, at the option of the defendant, at any time after five years from their date; and the defendant avers that the supposed bonds described in plaintiff's petition can only be redeemed by defendant, according to the recitals appearing upon their face, after the expiration of ten years from the date thereof. Wherefore defendant says that the execution

17 and issuance of said bonds were wholly unauthorized and the same are null and void.

6. Further answering, defendant says it is provided in section 4, article 11, of the constitution of the State of Texas that no county, city, or other municipal corporation shall become a subscriber to the capital stock of any private corporation or association or make any appropriation or donation to the same, or in anywise loan its credit; that the prohibition in said article contained denied the defendant the right to make an appropriation or donation to any railroad company or in anywise loan its credit in aid of or for the benefit of any railroad corporation; but, notwithstanding the constitutional restriction and inhibition above set forth, defendant says that its city council did, on the said 7th day of June, 1879, pass the ordinance above referred to, to authorize the issuance of fifteen thousand dollars of city bonds, redeemable after five years from date thereof, and said bonds were really and in fact issued in aid of the Gulf, Colorado and Santa Fé Railroad Company for the purchase of right of way over the streets of defendant and for the purchase of depot grounds in order to secure the construction of said road through the said city of Brenham; that said bonds so authorized to be issued for the railroad purpose aforesaid were sold by defendant to the following-named persons: Giddings & Giddings, $5,000; the said G. H. Mensing, $5,000, and to F. A. Engelke, $2,000; that thereafter the said Mensing became the owner and holder of the bonds previously purchased by Giddings & Giddings and Engelke from defendant and the remaining $3,000 of the issue of fifteen
18 thousand dollars, and is now the real owner and holder of the same; that said Giddings & Giddings, Mensing, and Engelke purchased said bonds with actual and personal knowledge of the unlawful purpose for which they were issued, as well as record notice of such illegal purpose as disclosed by the public records and minutes of defendant's city council. Wherefore defendant says that said bonds and interest-bearing coupons are null and void and constitute no legal charge against it.

7. Further answering, defendant says that if the plaintiff be the owner of said bonds and coupons it purchased the said coupons after their maturity and with knowledge of all the facts and circumstances attending the issuance of the same, well knowing that neither the said mayor nor secretary had authority under the ordinance aforesaid, nor the defendant under the constitution and laws of the State, to issue the same, and with knowledge that they were issued to raise money for the purpose of enabling defendant to purchase the right of way and depot grounds for the said Gulf, Colorado, and Santa Fé Railroad Company—an illegal purpose and one for which this defendant was not authorized to issue negotiable bonds.

8. Defendant further says that said bonds are illegal and void because they do not specify the purpose for which they were issued; nor have they ever been registered with the comptroller, as required by said ordinance and laws of the State.

9. Further answering, defendant says that at the date of the passage of said ordinance of June 7th, 1879, the current ex-
19 penses of defendant for ordinary municipal purposes was more than sufficient to absorb the current revenues derived

from taxation within the constitutional limit, and there was no power in defendant to levy a tax to pay the interest and provide a sinking fund to meet the principal of said supposed bonds.

Wherefore said bonds are null and void.

And, further answering, defendant says that prior to the time the bonds and coupons aforesaid were issued defendant had issued five thousand dollars of bonds for general purposes which were outstanding at the time the bonds in suit were issued, and the bonds and coupons declared upon in this suit are void.

Defendant hereby withdraws all averments in its answer heretofore filed which are inconsistent with the averments herein contained.

MAXEY & FISHER &
PEELER & PEELER,
*Attorneys for Defendant.*

(Indorsed:) 2092. German-American Bank *vs.* City of Brenham. Amended original answer of defendant. Filed April 24th, 1888. D. H. Hart, clerk.

*Plaintiff's First Supplemental Petition. Filed Ap'l* 24, 1888.

In U. S. Circuit Court for Western District of Texas, at Austin.

THE GERMAN-AMERICAN BANK
*vs.*
THE CITY OF BRENHAM. } No. 2092.

Now comes the plaintiff in the above cause and with leave of the court files this its first supplemental petition, and demurs to the answers of defendant on file herein, and says that said answers are wholly insufficient in law and show no valid grounds of defense to plaintiff's action herein, and of this the plaintiff prays the judgment of the court.

And said plaintiff specially excepts to each and every portion of said answer, and, among others, sets down the following exceptions thereto:

1st. That the plea of abatement of defendant to the jurisdiction of this court is wholly insufficient, being and consisting of mere general statements, and the citizenship of all the parties herein mentioned and of this defendant are not therein stated, and said plea of abatement is not sworn to in the manner provided by law, the deponent thereto only stating that such plea is true to the best of his knowledge and belief.

2nd. To all that part of amended answer of defendant contained in section 1 thereof, setting up the want of power in defendant to issue the bonds and coupons referred to in plaintiff's petition, it not appearing from such allegations and the constitution and laws of the State of Texas that defendant was prohibited by law from issuing and delivering the said bonds and coupons or that the acts of defendant were *ultra vires* and of no effect.

3rd. To all that part of said amended answer contained in section 2 thereof, alleging the illegality of the ordinance by reason of alleged manner of the making and execution of said coupons, said allegations being wholly irrelevant and immaterial to the question of plaintiff's right of recovery herein, and it does appear from said amended answer that such ordinance, with respect to said
21 coupons and otherwise, was and is legal and valid.

4th. To all that part of said amended answer contained and included in sections 3, 4, and 5 thereof, there being no sufficient or material matter set forth in said sections of said answer touching plaintiff's right of recovery herein; and it appears from said amended answer, with respect to the alleged inequality in the issuance of said bonds and the alleged variance between them and said ordinance, with respect to the right of redemption thereof, that such matters of alleged inequality are wholly immaterial to any issue in this cause and do not in any manner affect the right of plaintiff to recover herein.

5th. To all that part of said amended answer contained and included in sections 6 and 7 thereof, it not appearing therefrom or from the laws and constitution of said State that defendant did not have the power to issue bonds and coupons for the purpose in said answer alleged, to wit, for the purchase of the right of way and depot grounds for the said railroad through and within the corporate limits of defendant.

6th. To all that part of said amended answer contained in section 8 thereof, there being no matter set forth in said section affecting plaintiff's cause of action; and it does appear from the records and pleadings in this cause that said bonds were authorized and issued for the general and municipal purposes of defendant.

7th. To all that part of said amended answer included in section 9 thereof, the matters therein stated being immaterial and in
22 no manner affect the legality of the coupons sued on herein or the bonds to which they were attached.

And said plaintiff prays the judgment of the court of the foregoing demurrers and exceptions, and that the said answers of defendant be held insufficient and stricken out at defendant's costs.

DAVIS & DAVIDSON &
SAYLES & SAYLES,
*Att'ys for Plaintiff.*

Plaintiff, not waiving its foregoing demurrers and exceptions, but relying and insisting thereon in the event they should not be sustained and said answer stricken out, in response to the matters set up in the said answers, says—

1st. That at the date of the issuance of the said bonds the taxable values of the city of Brenham were sufficient under the laws then in force to authorize the issuance of said bonds, but if insufficient plaintiff or its said assignors had no notice thereof; that said city of Brenham was authorized by its special charter, granted in 1873, to issue the bonds and coupons of which are sued on.

2nd. That at the date of the issuance of said bonds—1879—the

city of Brenham had a population of more than one thousand people, and, in the absence of the provisions of its special charter, was authorized under the constitution and laws to issue the bonds, the coupons of which are sued on.

3rd. That the entire indebtedness of the city of Brenham at the date of the issuance of said bonds was within the limits fixed by law, but if not within such limits such excess, if any, was unknown to plaintiff or its said assignors.

23 4th. That the plaintiffs are the *bona fide* owners of said bonds and coupons; that if there are any irregularities in the issue of said bonds that plaintiff had no notice thereof at or before the time they became the legal owners and holders thereof, and that plaintiff is now advised that said bonds and coupons were issued under an ordinance of defendant, of date June 7th, 1879, a copy of which is hereto attached, marked "Exhibit A," and made a part and parcel of this answer; but plaintiff says that it or its said assignors had no notice or knowledge of said ordinance prior to or at the time of the issuance of said bonds and coupons, and had no notice or information or knowledge of any variance between said bonds and said ordinance, and that plaintiff and its said assignors became the owners and holders of said bonds in good faith and for value, and that plaintiff in this cause, being the holder and owner of all said bonds, is now and has always been ready and willing to surrender and deliver the same to defendant upon the payment of the amount due thereon, with interest, and now tenders to defendant the right of redemption of all said bonds and coupons, whether matured or not.

5th. That said Mensing Bros. & Co., the parties from whom plaintiff received said bonds, were *bona fide* purchasers before maturity of said bonds, having paid a valuable consideration therefor; that if there are any irregularities in said bonds that the said Mensing Bros. & Co. had no notice thereof at or before the time they became the legal owners and holders thereof.

6th. That said bonds were issued by the city of Brenham
24 for general purposes, as said city was authorized to do; that if the proceeds of said bonds or any part thereof were misappropriated by the city council of the city of Brenham that neither these plaintiffs nor the said Mensing Bros. & Co. had notice of such facts; that if the proceeds of said bonds were misappropriated by the city council or agents of the city of Brenham that such misappropriation should not in anywise affect the rights of this plaintiff to recover on said bonds.

7th. That said bonds were sold by the lawfully authorized agents of the city of Brenham, and the said city of Brenham received full value for said bonds.

8th. The plaintiff further pleads that the said city of Brenham is estopped by its own acts above set forth from impeaching the validity of said bonds or the coupons attached thereto; and this plaintiff further pleads, by way of estoppel, that the said city of Brenham paid the interest on said bonds without objection for three years after the issuance thereof; that through its authorized agents and officers on, to wit, about the 23rd day of ——, 1884, it published a

statement of its financial condition and included in such statement as a part of its legal liabilities said fifteen thousand dollars of bonds and coupons attached, including the ones sued on, all of which was made known to these plaintiffs before they became the owners and holders of said bonds.

Wherefore said defendant should be forever estopped from denying its liability on said bonds.

Plaintiff prays, as in its original petition, for judgment on
25 said coupons, for interest thereon from their maturities, respectively, at eight per cent. per annum, and for costs of suit.

DAVIS & DAVIDSON &
SAYLES & SAYLES,
*Att'ys for Plaintiff.*

EXHIBIT "A" to 1st Supplemental Petition.

"EXHIBIT A."

An ordinance to provide for the issue and sale of fifteen thousand dollars in coupon bonds of the city to borrow money for general purposes.

Be it ordained by the city council of the city of Brenham:

SEC. 1. That the mayor be, and is hereby, authorized and empowered to have printed coupon bonds of the city of Brenham to the amount of fifteen thousand dollars.

SEC. 2. Said bonds shall be three (3) of the denomination of one thousand dollars ($1,000.00), fourteen (14) of the denomination of five hundred ($500.00) dollars, twenty-five (25) of the denomination of one hundred ($100.00) dollars, and fifty of the denomination of fifty ($50.00) dollars.

They shall be made payable to bearer twenty years after date, at the office of the treasurer of the city of Brenham, with interest from date until paid, at the rate of ten per cent. per annum, payable semi-annually, on the first days of September and March, at the office of the treasurer of the city of Brenham, but the city shall have the right to redeem said bonds at any time after five years from date.

SEC. 3. Said bonds shall be dated and interest begin to
26 run on the first day of ——, A. D. 18—, provided that should any of said bonds be sold at a subsequent date the amount of interest then due shall be endorsed as a credit on the coupons first due.

SEC. 4. Said bonds shall be signed by the mayor and countersigned by the city clerk, and the seal of the city shall be affixed, and they shall be numbered and registered as series 2, No. —, giving the number of the bond issued, commencing with No. 1.

SEC. 5. Coupons shall be attached to each of said bonds for each semi-annual installment of interest, which said coupon shall have printed thereto the signature of the mayor and the city clerk, and shall be received for general ad valorem taxes of the city.

SEC. 6. Said bonds shall be negotiated and sold by the mayor

and finance committee of the city as the same may be required for general purposes, but in no case shall they be sold at a greater discount than five per cent., and the proceeds thereof shall be placed in the treasury of the city to the credit of the general fund.

SEC. 7. That there be, and is hereby, appropriated out of the general ad valorem tax of the city one-eighth of one per cent., or so much thereof as may be necessary, on the assessed value of the taxable property of the city as a special interest and sinking fund with which to pay the interest on said bonds and liquidate the same, and said fund shall be kept separate from the other funds of the city and shall be used for no other purpose.

SEC. 8. That this ordinance go into effect and have force
27 from and after its passage.

Approved June 7th, 1879.

M. P. KERR, *Mayor.*

Attest:

C. H. CARLISLE, *Secretary.*

I certify the above to be a true and correct copy.

H. C. M'INTYRE, JR., *City Clerk.*

Brenham, Texas, Sept. 8th, 1886.

(Indorsed:) No. 2092. The German-American Bank *vs.* The City of Brenham. Plaintiff's first supplemental petition. Filed April 24th, 1888. D. H. Hart, clerk.

*Defendant's First Supplemental Answer. Filed April* 24, 1888.

In the United States Circuit Court, at Austin.

THE GERMAN-AMERICAN BANK *vs.* THE CITY OF BRENHAM. } No. 2092.

Comes now defendant in the above-entitled cause, by attorney, and, without waiving its plea in abatement and to the jurisdiction, heretofore filed, but still insisting on the same, files, with leave of the court first had and obtained, its first supplemental answer in in reply to first supplemental petition of plaintiff.

Demurring to said first supplemental petition, defendant says the same is insufficient in law for the following reasons:

1. The allegations of said first supplemental petition fail to show any authority in defendant to issue the bonds mentioned and the coupons sued upon.

28 2. There is an absence of averments showing the specific purpose for which said bonds and coupons were issued.

3. It appears from the allegations thereof, considered in connection with said ordinance of June 7th, 1879—

1. That neither defendant nor its officers had authority to issue bonds redeemable in ten years.

2. That said ordinance is in contravention of the constitution of the State in permitting the coupons attached to said bonds to be receivable in payment of taxes.

3. Said ordinance is in violation of defendant's charter and the laws of the State, in that it authorizes the signatures of the mayor and the secretary to be printed to said coupons.

Wherefore defendant prays judgment of the court.

MAXEY & FISHER &
PEELER & PEELER,
*Att'ys for Def'd't.*

Defendant specially excepts to the following parts of said supplemental petition:

1. To the 4th and 5th clauses thereof, because the law charges plaintiff and Mensing Bros. & Co. with notice of the provisions of the ordinance which authorizes the issuance of the bonds and coupons mentioned, and notice otherwise becomes an immaterial inquiry.

2. To the 8th clause thereof, because neither the payment of interest on the bonds nor the publication of financial statements by the officers or agents of defendant will validate municipal bonds which were illegal and void in their inception.

29 Wherefore defendant prays judgment of the court.

MAXEY & FISHER &
PEELER & PEELER,
*Attorneys for Defendant.*

Further answering, defendant denies the allegations in said first supplemental petition and requires proof thereof.

MAXEY & FISHER &
PEELER & PEELER,
*Attorneys for Defendant.*

(Indorsed:) 2092. German-American Bank *vs.* City of Brenham. Defendant's first supplemental answer. Filed April 24th, 1888. D. H. Hart, clerk.

*Agreement as to Testimony. Filed April 24th*, 1888.

United States Circuit Court, at Austin.

GERMAN-AMERICAN BANK *vs.* THE CITY OF BRENHAM.

It is agreed by the parties in the above-entitled cause as follows:

1. That the city of Brenham was incorporated by an act of the Legislature of the State of Texas February 4th, 1873; that at the date of its incorporation and of the passage of the ordinance, as stated in the pleadings in this case, the city of Brenham had a population of over 4,000 and less than 10,000 inhabitants.

2. On the 28th of March, 1881, Thomas Dwyer instituted a suit

against John W. Hackworth, assessor and collector of taxes
30 for the city of Brenham, to enjoin the collection of certain taxes, including as a part thereof one-eighth of one per cent. to pay interest and provide a sinking fund on the bonds of said city; that the bonds referred to in said suit are the identical bonds mentioned in the pleadings in this case, and it is agreed that the said case is reported as the case of Dwyer *vs.* Hackworth, 57 Tex., 245 *et seq.*: Provided, That this agreement shall not relieve the plaintiff from the necessity of introducing one of said bonds and all the coupons sued on in evidence on the trial of this cause.

3. It is agreed that the coupons sued on were presented to the proper authorities of the city of Brenham for payment at the proper time, and before the institution of this suit, and that payment thereof was then and there refused.

4. It is agreed that either party may introduce in evidence printed or certified copies of the charter, ordinances, resolutions, and proceedings of the city of Brenham, and the original minutes, and also tax-rolls of the assessor of taxes, if the originals of the same would be competent evidence and admissible as such.

DAVIS & DAVIDSON &
SAYLES & SAYLES,
*Attorneys for Plaintiff.*
MAXEY & FISHER &
PEELER & PEELER
*Attorneys for Defendant.*

(Indorsed:) Bank *vs.* Brenham. Filed April 24th, 1888. D. H. Hart, clerk.

31 *Charge of the Court on Plea in Abatement.*

THE GERMAN-AMERICAN BANK
*vs.*
THE CITY OF BRENHAM. } No. 2002.

Charge on plea in abatement submitted to the jury.

The defendant in his plea in abatement sets up that the plaintiff does not own or hold the bonds in such a way as to entitle him to sue in this court.

This plea presents an issue of fact which you are to determine. I charge you that the bonds and coupons in question are on their face commercial paper. The holding of such a paper, the employment of counsel to sue on these coupons by the bank, the failure of defendant to suggest or show that any one else is the owner of the coupons makes a *prima facie* case in favor of plaintiff.

If you find that Mensing was the purchaser and owner of the coupons, and that he pledged them to secure a loan made to him by the bank, and that in fact Mensing no longer claims or owns the coupons, you will find for the plaintiff. The failure to suggest that any one else owned the bonds or coupons or to name any one else as their owner is a strong circumstance in favor of the plaintiff.

32 *Charge to the Jury. Filed Apr. 26th*, 1888.

In U. S. Circuit Court, at Austin. April Term, 1888.

GERMAN-AMERICAN BANK *vs.* THE CITY OF BRENHAM.

Sayles & Davidson, attorneys for plaintiff.
Maxey & Fisher, attorneys for defendant.

Charge to jury. Filed April 26, 1888.

Bonds to the amount of $15,000.00, with interest coupons attached, were issued in 1879 by the defendant city, then operating under the charter of 1873. In that charter section 2 says: "That the city council shall have power and authority to borrow money for general purposes, not exceeding $15,000, fifteen thousand dollars, on the credit of the city."

The constitution of the State, 1876, allows such cities as Brenham to "collect an annual tax to defray the expenses of their local government, not to exceed for any year one-fourth of one per cent."

The power in the city to borrow money carries with it the authority to issue the bonds in this case. It may be that the limitation of the power to tax beyond ¼ one per cent. impairs the ability of the defendant to pay the bonds and coupons, but I do not think it denies the capacity of the corporation in 1879 to issue the bonds as commercial paper and bind the constituency to the payment thereof. Hence you will begin your consideration of the issuable facts with the fixed opinion that the city must pay the coupons now sued on in full, unless you should find adversely to plaintiff
33 on the single issue I shall directly present to you. If you find adversely to the plaintiff on that issue recovery can be had for only a part of the coupons sued on.

Before stating that issue let us sum up some of the matters of fact that are not disputed. Such evidence shows that the city, under the charter of 1873, issued by ordinance, in 1879, the bonds the coupons on which this suit is brought; that the city in pursuance of ordinances sold the bonds, and that — of the proceeds of the sale were expended by the city council unlawfully—that is, in aid of a railway company; that Giddings bought $5,000 of the bonds in August, 1879, and that Mensing became the owner of the whole issue before March, 1883, the interest coupons having been paid up to that date; that while Mensing held and owned the coupons on the whole issue, three series of them amounting to 2,250, became due and were unpaid. These unpaid coupons were due as follows: M'ch, 1883, Sept., 1883, M'ch, 1884, and Mensing pledged them, after the last date, to the plaintiff to secure the payment of the loan made by the bank. The defendant, having shown that some of the coupons were past due before the bank became the holder of them, has offered evidence to show that Mensing was charged with knowledge of such facts attending the issue and sale of bonds and the unlawful purposes for which the money obtained from their sale was ex-

pended by the city council as should forbid the bank, to whom Mensing pledged the overdue coupons, to recover on the past-due coupons, amounting to $2,250.

Now, then, the single issue of fact which I shall present you
34 is, Does the evidence show that Mensing, who purchased the bonds before the series of coupons mentioned were past due, and in whose hands they had become due, knew at any time before the purchase of the coupons that the city council in causing the bonds to be issued ostensibly for the "general purposes," as is recited on the face of the bonds, really intended that the proceeds of the bonds should and would be used, not for "general purposes," but that the proceeds were to be expended and were expended in aid of a railway company? In considering this matter you must keep in mind that the acts or intentions of the city council, acting as an official body in the exercise of powers delegated to it, can be ascertained in but one way—that is, by a fair reading of the city ordinances. Such a reading of the ordinances relating to these bonds shows clearly that the bonds were issued for "general purposes," and you would be authorized, when considering the rights of an innocent purchaser, one purchasing before maturity and for value, to conclude that the corporation issued and intended to issue them for such purposes as are stated in the bonds. Such a conclusion would be entitled to the force of a legal presumption if the plaintiff and the pledgor, Mensing, had come into the ownership or the possession of the coupons before any of them were overdue. It being admitted that $2,250 of the coupons were overdue when they left the hands of Mensing and came to the German Bank, you are advised to put such a conclusion aside and examine all the evidence illustrating the issue I have presented.

You may inquire into the acts, sayings, purposes, or intentions of
35 any one or all of the several members of the city council as individuals for the purpose only of ascertaining whether or not Mensing had any understandings with them or any one of them to the effect that the corporation would issue the bonds ostensibly for a lawful purpose, but that in fact the money obtained from the sale of the bonds should or would be expended in aiding a railway company. You may inquire, too, whether Mensing at the time, before he bought the bonds and coupons, knew that the money coming from the sale of the bonds had been at any time expended by acts of the city council. If, upon considering such testimony, you should find that Mensing was charged with knowledge at any time before he purchased the bonds, then you will deny the plaintiff any recovery of the $2,250.00 in coupons which were overdue, but you will allow plaintiff the balance of his demands.

Your conclusion on that single issue will control your verdict.

By way of further defense the defendant contends that the city did not comply with that article of the constitution which provides that all cities before incurring a debt shall provide by ordinance for securing the payment of the interest thereon, and for a sinking fund to pay the principal, and therefore the plaintiff was charged with knowledge of their invalidity. Plaintiff relies on the following ordi-

nance to show compliance with the requirements of the constitution: * * *

"SEC. 7. That there be, and is hereby, appropriated out of the general ad valorem tax of the city one-eighth of one per cent., or so much thereof as may be necessary, on the assessed value of the taxable property of the city as a special interest and sinking fund with which to pay the interest on said bonds and liquidate
36 the same, and said fund shall be kept separate from the other funds of the city and shall be used for no other purpose.

"SEC. 8. That this ordinance go into effect and have force from and after its passage."

I charge you that the ordinance read for you, in connection with the other ordinances that I shall not read to you, shows a substantial and sufficient compliance with the law, and on this defense you will find for plaintiff.

ALECK BOARMAN, *Judge.*

(Indorsed:) No. 2092. German-American Bank *vs.* City of Brenham. Charge of court. Filed April 26, 1888. D. H. Hart, clerk.

*Verdict of Jury on Plea in Abatement. Filed April 30th,* 1888.

GERMAN-AMERICAN BANK *vs.* CITY OF BRENHAM.

AUSTIN, TEXAS, *25th April,* 1888.

We, the jury, find for the plaintiff.

THOMAS BALL, *Foreman.*

(Indorsed:) 2092. German-American Bank *vs.* City of Brenham. Filed April 30th, 1888. D. H. Hart, clerk.

*Verdict of Jury on the Merits. Filed April 30th,* 1888.

We, the jury, find for the plaintiff the full amount claimed.

THOS. H. ESPY, *Foreman.*

Ap'l 26th, 1888.

Amount claimed, fifty-five hundred and ten & $\frac{10}{100}$ dollars ($5,510.10).

THOS. H. ESPY.

(Indorsed:) 2092. German-American Bank *vs.* The City of Brenham. Filed April 30th, 1888. D. H. Hart, clerk.

37 *Judgment.*

THE GERMAN-AMERICAN BANK
*vs.*
THE CITY OF BRENHAM. } No. 2092.

On this the 26th day of April, 1888, came on to be heard the

above-entitled cause, and, by leave of the court, the defendant filed its amended original answer and the plaintiff, by leave of the court, filed its first supplemental petition by way of replication and the defendant, by leave of the court, interposed thereto its supplemental answer; and thereupon came on to be heard and determined by court and jury defendant's plea in abatement and to the jurisdiction of the court, which, being presented to the jury upon the evidence and the charge of the court, the jury returned into court the following verdict: "We, the jury, find for the plaintiff;" and thereupon came on to be heard before the court the general demurrer and the special demurrer and exceptions interposed by defendant to plaintiff's original petition, which, being considered by the court, were by it overruled; to which ruling of the court the defendant then and there in open court excepted; and thereupon came on to be heard by the court plaintiff's general demurrer and special exceptions to defendant's pleadings, which, being considered by the court, were by it overruled; to which ruling of the court the plaintiff then and there in open court excepted; and thereupon the special exceptions and demurrers of defendant to plaintiff's first supplemental petition came on to be heard and were by the court overruled; to which ruling of the court the defendant then and there excepted;

38 and thereupon, the trial of the cause proceeding before the court and jury, the court and jury having heard all the pleadings, the evidence, and arguments of counsel, the jury, being duly charged by the court, retired to consider their verdict, and thereafter returned into court the following verdict: "We, the jury, find for the plaintiff the full amount claimed, fifty-five hundred and ten and $\frac{10}{100}$ dollars." It is therefore considered and adjudged by the court, and it is so ordered and adjudged, that the said plaintiff do have and recover of and from said defendant, The City of Brenham, the said sum of fifty-five hundred and ten and $\frac{10}{100}$ dollars, with interest from date, at eight per centum per annum, and all costs of suit, for which execution may issue.

*Bill of Exceptions No.* 1. *Filed April 27th,* 1888.

United States Circuit Court, at Austin. Adjourned Term, April, 1888.

THE GERMAN-AMERICAN BANK
*vs.*
THE CITY OF BRENHAM. } No. 2092.

Defendant's bill of exceptions No. 1.

Be it remembered that upon the trial of the above entitled and numbered cause the following proceedings were had therein:

The plaintiff having presented to the court its original petition, the defendant thereupon presented to the court for its action the following general demurrer thereto, contained in its amended original answer filed in this cause on the 24th day of April, 1888:

Demurring to the petition of plaintiff, defendant says that the same is insufficient in law, because—

1. It does not specify the purpose for which said bonds and coupons were issued; and

2. It does not appear therefrom that defendant was authorized by the constitution and laws of Texas to issue the alleged bonds and the interest-bearing coupons declared upon.

Which said demurrer, having been considered by the court, was by the court overruled; to which ruling of the court the defendant then and there in open court excepted, and now here tenders this its bill of exceptions and prays that the same, which has been submitted to counsel for plaintiff, may now here in open court be allowed and authenticated by the signature of the judge trying said cause, which is accordingly done, in open court, this 27th day of April, A. D. 1888.

ALECK BOARMAN, *Judge.*

(Endorsed:) No. 2092. The German-American Bank *vs.* The City of Brenham. Bill of exceptions No. 1. Filed April 27, 1888. D. H. Hart, clerk.

*Defendant's Bill of Exceptions No. 2. Filed April 27th,* 1888.

United States Circuit Court, at Austin. Adjourned Term, April, 1888.

THE GERMAN-AMERICAN BANK *vs.* THE CITY OF BRENHAM. } No. 2092.

Defendant's bill of exceptions No. 2.

Be it remembered that upon the trial of the above entitled and numbered cause the following proceedings were had therein:

The plaintiff having presented to the court its first supplemental petition, filed herein April 24, 1888, the defendant thereupon presented to the court for its action the following general demurrer and special exceptions thereto, contained in its first supplemental answer, filed herein on said 24th day of April, 1888:

Demurring to said first supplemental petition, defendant says the same is insufficient in law for the following reasons:

1. The allegations of said first supplemental petition fail to show any authority in defendant to issue the bonds mentioned and the coupons sued upon.

2. There is an absence of averments showing the specific purpose for which said bonds and coupons were issued.

3. It appears from the allegations thereof, considered in connection with said ordinance of June 7th, 1879—

1. That neither defendant nor its officers had authority to issue bonds redeemable in ten years.

2. That said ordinance is in contravention of the constitution of the State in permitting the coupons attached to said bonds to be receivable in payment of taxes.

3. Said ordinance is in violation of defendant's charter and the laws of the State, in that it authorizes the signatures of the mayor and secretary to be printed to said coupons.

Defendant specially excepts to the following part of said supplemental petition:

1. To the 4th and 5th clauses thereof, because the law
41 charges plaintiff and Mensing Bros. & Co. with notice of the provisions of the ordinance which authorized the issuance of the bonds and coupons mentioned, and notice otherwise becomes an immaterial inquiry.

2. To the 8th clause thereof, because neither the payment of interest on the bonds nor the publication of financial statements by the officers or agents of defendant will validate municipal bonds which were illegal and void in their inception.

Which said demurrer and special exceptions, having been considered by the court, were by the court overruled; to which ruling of the court the defendant then and there in open court excepted, and now here tenders this its bill of exceptions and prays the same, which has been submitted to counsel for plaintiff, may now here in open court be allowed and authenticated by the signature of the judge trying said cause, which is accordingly done, in open court, this 27th day of April, 1888.

ALECK BOARMAN, *Judge.*

(Indorsed:) No. 2092. The German-American Bank *vs.* The City of Brenham. Bill of exceptions No. 2. Filed April 27, 1888. D. H. Hart, clerk.

*Defendant's Bill of Exceptions No.* 3. *Filed April* 27, 1888.

United States Circuit Court, Adjourned Term, at Austin. April, 1888.

THE GERMAN-AMERICAN BANK *vs.* THE CITY OF BRENHAM. } No. 2092.

Be it remembered that on the trial of the above entitled and
42 numbered cause the following, among other, proceedings were had after the pleadings of both parties, plaintiff and defendant, had been read:

1. The plaintiff admitted that the city of Brenham has and has always had less than ten thousand inhabitants and over two thousand inhabitants.

2. It proved that said city acts and since 1873 has acted under a special charter granted it in that year, and that said charter contains, among others, the following provision, under which charter the power to issue the bonds hereinafter referred to is claimed:

"SECTION 2. That the city council shall have the power and authority to borrow, for general purposes, not exceeding fifteen thousand ($15,000) dollars on the credit of said city."

3. Plaintiff also put in evidence and made proof of the following ordinances of the city of Brenham:

"An ordinance to provide for the issue and sale of fifteen thousand dollars in coupon bonds of the city to borrow money for general purposes.

"Be it ordained by the city council of the city of Brenham:

"SEC. 1. That the mayor be, and is hereby, authorized and empowered to have printed coupon bonds of the city of Brenham to the amount of fifteen thousand dollars.

"SEC. 2. Said bonds shall be—three (3) of the denomination of one thousand (1,000) dollars, fourteen (14) of the denomination
43 of five hundred (500) dollars, twenty-five (25) of the denomination of one hundred (100) dollars, and fifty (50) of the denomination of fifty (50) dollars. They shall be made payable to bearer twenty years after date at the office of the treasurer of the city of Brenham, with interest from date until paid, at the rate of ten per cent. per annum, payable semi-annually, on the first days of September and March, at the office of the treasurer of the city of Brenham, but the city shall have the right to redeem said bonds at any time after five years from date.

"SEC. 3. Said bonds shall be dated and the interest begin to run on the first day of ——, A. D. 18—: Provided, That should any of said bonds be sold at a subsequent date the amount of interest then due shall be indorsed as a credit on the coupons first due.

"SEC. 4. Said bonds shall be signed by the mayor and countersigned by the city clerk, and the seal of the city shall be affixed, and they shall be numbered and registered as series 2, number —, giving the number of the bond issued, commencing with No. 1.

"SEC. 5. Coupons shall be attached to each of said bonds for each semi-annual installment of interest, which said coupons shall
44 have printed thereto the signature of the mayor and the city clerk, and shall be received for general ad valorem taxes of the city.

"SEC. 6. Said bonds shall be negotiated and sold by the mayor and finance committee of the city, as the same may be required, for general purposes, but in no case shall they be sold at a greater discount than five per cent., and the proceeds thereof shall be placed in the treasury of the city to the credit of the general fund.

"SEC. 7. That there be, and is hereby, appropriated out of the general ad valorem tax of the city one-eighth of one per cent., or so much thereof as may be necessary, on the assessed value of the taxable property of the city as a special interest and sinking fund with which to pay the interest on said bonds and liquidate the same, and said fund shall be kept separate from the other funds of the city and shall be used for no other purpose.

"SEC. 8. That this ordinance go into effect and have force from and after its passage.

"Approved June 7th, 1879.

"M. P. KERR, *Mayor.*

"Attest:

"C. H. CARLISLE, *Secretary.*"

"An ordinance to provide for the just and equal valuation of property for the assessment of taxes."

45 "Be it ordained by the city council of the city of Brenham:

"SEC. 1. It shall be the duty of the assessor and collector of taxes, as soon as his assessment is completed, to deliver his lists and books to the committee on assessments for their examination and revision.

"SEC. 2. It shall be the duty of the committee on assessments, as soon as they receive the assessment lists and books mentioned in the first section, to give notice of the time and place of their meeting by a notice published in the official paper of the city at least five (5) days before the time designated for their meeting.

"SEC. 3. It shall be the duty of the committee on assessments at such meeting to examine the lists of real and personal property delivered to them under the first section of this ordinance and of which the owners are known. They shall see that each and every person has rendered his property at a fair market value, as is contemplated by law, and shall have power to send for persons and papers and swear & qualify persons to testify to ascertain the value of said property. They shall carefully revise the lists of the property of each person so that the same shall be a true and correct list of the same, and shall fix a fair market value of all property on the list.

46 "SEC. 4. The committee on assessments may hold as many meetings as may be necessary for completion of their work, and it shall not be necessary to give public notice of any adjourned meeting. They shall have power to correct any errors in the listing or valuation of property at any time before the tax is paid on said property.

"SEC. 5. The assessor of taxes shall attend each meeting of the committee on assessments with his books and papers, and shall, under the direction of the committee, enter upon his assessment-roll lists and valuation of property as determined by the committee.

"SEC. 6. If any party rendering property for assessment is dissatisfied with the list and valuation made out by the assessor as directed in the previous section and does not agree to the same he may appeal to the board of appraisement by giving to the assessor a written notice of his intention to appeal within ten (10) days after his property is asssessed, as heretofore directed.

"SEC. 7. When an appeal is taken to the board of appraisement it shall be the duty of the assessor to deliver to said board a copy of the list and appraisement objected to, with all such documentary evidence as may have been submitted to the committee on assessment. The board of appraisement may have such ad-
47 ditional evidence touching the matter in controversy as may be offered. The decision of the board shall be final and the assessor shall correct his assessment-roll in accordance with their decision.

"SEC. 8. When any property has been listed by the assessor which has not been rendered or the owner of which is unknown, the com-

mittee on assessment shall appraise the value of the same; and it shall be the duty of said committee to carefully examine the list of assessment and cause assessor to add thereto all property which has not been rendered. The assessor shall enter upon his rolls all property and valuation as directed by the committee under this section.

"SEC. 9. This ordinance shall take effect and be in force from and after its passage.

"Approved June 7th, 1879.

"M. P. KERR, *Mayor.*

"Attest:

"C. H. CARLISLE, *Sec'y.*"

4. Plaintiff further proved the issuance by the city, July 31, 1879, (under the ordinance of June 7th, 1879, entitled "An ordinance to provide for the issue and sale of fifteen thousand dollars in coupon bonds of the city to borrow money for general purposes"), of coupon bonds to the amount of fifteen thousand dollars, all which bonds and coupons attached (except as to amounts and numbers) are alike and read thus:

(By agreement copy of bond with attached coupons is inserted. See next page.)

(Here follows copy of bond marked p. 48.)

49 5. Plaintiff also introduced in evidence the coupons sued upon by it and described in its petition, and proved that said coupons were the same as those described in said petition. It also proved that, June 12th, 1884, G. H. Mensing, of Mensing Bros. & Co., deposited with plaintiff bank, as collateral security for a loan of $10,000 made and future advances to be made by plaintiff to Mensing Bros. & Co., $10,000 of the bonds aforesaid, to wit, bonds Nos. 56 to 65, both inclusive, for $100 each; bonds Nos. 76 to 81, both inclusive, and bonds Nos. 84 to 89, inclusive, each bond calling for $500, and bonds Nos. 90 to 92, both inclusive, for $1,000 each, to all of which said bonds there were attached interest coupons from and including March 1, 1883. Mensing Bros. & Co. now owe plaintiff about $35,000.

Plaintiff further proved by G. H. Mensing that at the time aforesaid, June 12th, 1884, Mensing Bros. & Co., through him, deposited with plaintiff bank other coupons embraced in those in suit, which had been clipped by Mensing Bros. & Co. from each of the remaining $5,000 of said bonds deposited by Mensing Bros. & Co. with Ball, Hutchings & Co., of Galveston, and that of the coupons clipped as aforesaid from each of the said last-named $5,000 of bonds there were belonging to said bonds last aforesaid three overdue coupons at the time of deposit with plaintiff, to wit, the coupons due March, 1883, September, 1883, and March, 1884.

Plaintiff further proved that, September 4, 1879, Mensing bought from the defendant city $5,600 of said bonds at 95 cents on the dollar, and, August 10, 1880, that he bought of F. A. Engelke $2,150 of

bonds in exchange for other property, taken at 100 cents on
50 the dollar, and that January 17th, 1881, he bought of J. F. Conlay $2,050.00 of said bonds at 94½ cents on the dollar, and on March 4th, 1882, that he bought — C. H. Schweiss $800 *dollars* of said bonds at 75 cents on the dollar, and on September 5th, 1882, that he bought — Giddings & Giddings $5,000 of said bonds at 90 cents on the dollar.

Defendant thereupon proved—

1. That the annual current expenses of the city of Brenham for the year 1879, beginning April 1 of said year, exclusive of interest to accrue on the bonds issued July 31, 1879, and a sinking fund of two per cent., amounted to the sum of $4,097, in addition to which there was outstanding against the city an outstanding bonded indebtedness of $771.44. This $771.44 was paid by the defendant with proceeds of sale of bonds issued under bond ordinance June 7th, 1879. Defendant further proved that the income of said city for the year 1879 from all sources was by the city council estimated at $4,590. Defendant further proved that the annual interest on said bonds amounted to $1,500 and the 2% sinking fund to $300.00 additional. Defendant further proved that July 30th, 1879, before the issuance of said bonds, the valuation of property of the city of Brenham subject to municipal taxation was $1,050,000; that the ordinance of June 7th, 1879, under which said bonds were issued, appropriated out of the general ad valorem tax of the city one-eighth of 1% to pay the interest on the bonds and create a sinking fund; and, further, that one-eighth of 1% would yield $1,312.50.

2. Defendant also introduced in evidence the following proceedings of the city council of Brenham:

51 "Alderman Wilkins moved, seconded by Alderman Reichardt, that the city issue bonds to the amount of ($15,000.00) fifteen thousand dollars, or so much thereof as may be necessary, for the purpose of placing the fire department of the city in a more efficient condition by purchasing the necessary apparatus for the use of same and to purchase the necessary land to grant the right of way and depot grounds to the G., C. & S. F. R. R., and that the city attorney be directed to draft an ordinance to that effect.

"The motion was carried, all the aldermen voting in the affirmative except Alderman Amsler, who voted no.

"On motion of Alderman Wilkins, seconded by Alderman Reichardt, Messrs. D. A. Allen and M. Amsler were appointed a committee and requested to wait upon Messrs. D. C. Giddings, C. R. Breedlove, and B. H. Bassett to consult with them as to whether the city had authority to raise the assessment after the assessor had accepted the same from the property-owners."

3. Defendant then introduced in evidence an ordinance of the city providing for a more efficient organization of the fire department. The ordinance is as follows:

"An ordinance providing for the more efficient organization of the fire department of the city of Brenham.

52 "Be it ordained by the city council of the city of Brenham:

"SEC. 1. That the sum of three thousand (3,000) dollars be, and is hereby, appropriated for the use of the fire department out of any funds in the city treasury arising from the sale of bonds of the city authorized by an ordinance entitled 'An ordinance to provide for the issuance and sale of fifteen thousand ($15,000) dollars in coupon bonds of the city to borrow money for general purposes," approved June 7th, 1879, in the purchase of hose, the securing of a permanent supply of water in case of fires, paying any balance that may be due on the purchase of the fire steamer, and for such other purposes as will promote the efficiency of the fire department.

"SEC. 2. This ordinance shall take effect and be in force from and after its passage.

"Approved June 9th, 1879.

"M. P. KERR, *Mayor.*

"Attest:

"C. H. CARLISLE, *Secr'y.*"

4. Defendant next introduced an ordinance of the city providing for any deficiency in the general revenue of the city for the fiscal year beginning April 1, 1879. Said ordinance is as follows:

"An ordinance to provide for any deficiency in the general revenue of the city for the fiscal year commencing April 1, 1879.

53 "Be it ordained by the city council of the city of Brenham:

"SEC. 1. That the sum of two thousand ($2,000) dollars be, and is hereby, appropriated to cover any deficiency in the general revenue for the year commencing on the 1st day of April, 1879.

"SEC. 2. Should there not be in the treasury of the city at any time during the year commencing on the 1st day of April, 1879, funds sufficient to pay the interest and sinking fund — become due on the bonds issued by the city or to pay the current necessary expenses of the city government, the mayor is authorized to sell bonds of the city, not exceeding two thousand ($2,000.00) dollars in value, sufficient to meet such deficiency, and the funds arising from said sale shall be applied to discharge such deficiency.

"SEC. 3. This ordinance shall take effect and be in force from and after its passage.

"Approved June 9th, 1879.

"M. P. KERR, *Mayor.*

"Attest:

"C. H. CARLISLE, *Secretary.*"

5. Defendant also put in evidence the testimony of E. C. Abbott, of Thomas Dwyer, of —— Wilkins, of —— Amsler, and of said G. H. Mensing, tending to prove that said G. H. Mensing, of the firm

of Mensing Bros. & Co., through whom plaintiff claims, had
54 notice of all the foregoing facts at and prior to the purchase by him or by said firm of any of said bonds; and further tending to prove that, prior to and at the time of the acquisition of said bonds and coupons by G. H. Mensing or by his firm, he knew that the bonds, afterwards deposited by Mensing Bros. & Co. with plaintiff, were not in fact issued for "general purposes" of municipal government, but were issued in aid of the Gulf, Colorado and Santa Fé Railroad Company, and that the ordinance of June 7th, 1879, under which they were issued, was passed with the view of enabling the city of Brenham, by the sale of bonds, to purchase for said Gulf, Colorado and Santa Fé Railroad Company in and through said city. depot grounds and right of way.

6. The defendant next propounded in evidence the following ordinance of the city of Brenham:

"An ordinance designating the line for the Gulf, Colorado and Santa Fé Railroad Company through the city and granting the right of way to said road.

"Be it ordained by the city council of the city of Brenham:

"SEC. 1. That the following land be, and is hereby, designated for the line of the Gulf, Colorado and Santa Fé Railroad through the city, to wit: Beginning at the southern boundary line of the corporation, thence to Key street, intersecting the same south of Judge McFarland's residence, as near as practicable to said southern boundary line; thence with said Key street to the southwest corner of lot No. 3, in block No. 7, in Key's addition to the city of
55 Brenham; thence by the most practicable route to West street between O. Crozier's and W. B. Wilson's residence; thence with West street to the northern boundary of the city.

"SEC. 2. The right of way through the city is hereby given to the Gulf, Colorado and Santa Fé Railroad Company, said right of way to be as wide as necessary for the proper construction of said road.

"SEC. 3. The committee, composed of members of the council and citizens heretofore appointed by the city council, are hereby authorized and instructed to purchase the necessary property for depot grounds for said railroad company in the city, and such other property along the line of said railroad through the city as may be necessary for right of way.

"SEC. 4. Authority is hereby given to said railroad company to condemn such property along said line as may be necessary for said right of way in all cases where the owners of property and said committee cannot agree upon a price for said property.

"SEC. 5. Said committee shall take all titles and have deeds executed to the city of Brenham, and shall report all purchases made by them and turn over all title papers to the city council.

"SEC. 6. The sum of ten thousand ($10,000) dollars, or so
56 much thereof as may be necessary, is hereby appropriated for the purchase of said right of way and depot grounds, and the

mayor and secretary shall draw a warrant therefor in favor of the chairman of said committee whenever requested to do so.

"Approved June 26, 1879.

"M. P. KERR, *Mayor.*

"Attest:

"C. H. CARLISLE, *Secretary.*"

7. Defendant next introduced the following proceedings of the city council:

"COUNCIL HALL, BRENHAM, *July 24th*, 1879.

"Council met pursuant to a call of the mayor.

"At the roll-call the following members were present: His honor, M. P. Kerr, mayor; Aldermen J. A. Wilkins, D. A. Allen, E. Reichardt, and M. Amsler.

"The mayor stated the object of the meeting, being to hear the report of the railroad committee. Col. D. C. Giddings, chairman of said committee, stated that the G., C. & S. F. R. R. Co. had selected Mr. B. Eldridge as their arbitrator, and that each property-owner along the line had selected arbitrators for themselves. The results of the arbitration were as follows:

"To J. B. Vanness was allowed $150.00 for the right of way, 75 feet wide, and the corner of which will be cut off, he to move his own fence. Arbitrators in this case, B. Eldridge, Wm. Axer, and Chas. Asbeck.

"To Miller & Perry was allowed $200.00 for the right of way
57 through their property, 100 feet wide. Arbitrators in this case, B. Eldridge and Wm. Axer.

"To Chas. Asbeck was allowed $100.00 for the right of way through his property, 100 feet wide. Arbitrators in the case, B. Eldridge and Wm. Axer.

"To Ambrose Petty was allowed $250.00 for the right of way through his property, 75 feet wide, and corner of lot. Arbitrators in the case, B. Eldridge and Wm. Axer.

"To William A. Wood was allowed $600.00 for the right of way through both of his lots, 75 feet wide. Arbitrators in the case, B. Eldridge, E. F. Ewing, and John Randle.

"To I. B. M'Farland was allowed $1,200.00 for right of way through his property, 50 feet wide. Arbitrators in the case, B. Eldridge, E. F. Ewing, and John A. Randle.

"To H. L. M'Clung was allowed $1,000.00 for right of way through his property, 55 feet wide. Arbitrators in the case, B. Eldridge, E. Ross, and R. Hoffman.

"To James F. Estes was allowed $1,000.00 for his entire lot and improvements. Arbitrators in the case, B. Eldridge, P. W. Conell, and C. M. Campbell.

"To Mrs. Barnett was allowed $800.00 for the right of way through her property, 50 feet wide. Arbitrators in the case, B. Eldridge, J. E. Shepard, and C. M. Campbell.

58 "To. J. N. Brown nothing was allowed, he agreeing to give the road-bed. Arbitrators in the case, B. Eldridge and Wm. Axer.

"To J. L. Moore was allowed $1,500.00 for the right of way through his property, 50 feet wide. Arbitrators in the case, B. Eldridge, Dr. T. O. Hines, and C. M. Campbell.

"Col. Giddings reported for the committee that they had agreed to settle without arbitration with the following parties for the following amounts, to wit: To M. M. Baine allowed $350.00 for 50 feet off the northwest corner of his lot, parallel with the railroad.

"To Alex. Simon was allowed $1,250.00 for all of his lot, being about one acre of ground, the same to be designated as a freight depot.

"To P. H. Swearingen was allowed $1,300.00 for all of his lot, he retaining the privilege of removing the improvements.

"To T. A. Low was allowed $3,500.00 for 100 by 200 feet and all improvements.

"To O. Crozier was allowed $1,250.00 for right of way through his property, 25 feet west of the center of the track and all east of the track.

"The following case was arbitrated:

"To Higgins' heirs was allowed $35.00 per acre for every acre of land that the railroad may need in passing through the tract. Arbitrators in the case, B. Eldridge and C. P. Cillough.

"The following resolution, offered by Alderman E. Reichardt, was adopted:

59 "Resolved, That if the Gulf, Colorado & Santa Fé Railroad Company will advance the amount, without interest, which will be sufficient to make up the deficiency in securing the right of way through the city of Brenham and to purchase necessary depot grounds within said city for said railroad that the city of Brenham will agree to keep open account with said railroad company and give said Co. credit for all municipal taxes as the same accrues until said amount so advanced is cancelled.

"There being no further business, the council then adjourned.

"M. P. KERR, *Mayor.*

"DAN. P. McINTYRE,
"*Sec'y pro Tem.*"

8. Defendant further proved that August 18th, 1879, the following proceedings were had by the city council:

"The mayor reported city bonds sold as follows:

"To Messrs. Giddings & Giddings, Brenham, Texas:

| | | | |
|---|---|---|---|
| Bond No. 90—amount, | $1,000; | sold at 95c.; am't realized-- | $950 00 |
| Bond No. 91—amount, | 1,000; | sold at 95c.; am't realized-- | 950 00 |
| Bond No. 76—amount, | 500; | sold at 95c.; am't realized-- | 475 00 |
| Bond No. 77—amount, | 500; | sold at 95c.; am't realized-- | 475 00 |
| Bond No. 78—amount, | 500; | sold at 95c.; am't realized-- | 475 00 |
| Bond No. 79—amount, | 500; | sold at 95c.; am't realized-- | 475 00 |
| Bond No. 80—amount, | 500; | sold at 96c.; am't realized-- | 475 00 |
| Bond No. 81—amount, | 500; | sold at 95c.; am't realized-- | 475 00 |
| Total sold G. & G-- | $5,000 | Total am't realized----- | $4,750 00 |

To G. H. Mensing, Galveston, Texas:

60

| | | | |
|---|---|---|---|
| Bond No. 56—amount, | $100; | sold at 95c.; am't realized-- | $95 00 |
| Bond No. 57—amount, | 100; | sold at 95c.; am't realized-- | 95 00 |
| Bond No. 58—amount, | 100; | sold at 95c.; am't realized-- | 95 00 |
| Bond No. 59—amount, | 100; | sold at 95c; am't realized-- | 95 00 |
| Bond No. 60—amount, | 100; | sold at 95c.; am't realized-- | 95 00 |
| Bond No. 61—amount, | 100; | sold at 95c.; am't realized-- | 95 00 |
| Bond No. 62—amount, | 100; | sold at 95c.; am't realized-- | 95 00 |
| Bond No. 63—amount, | 100; | sold at 95c.; am't realized-- | 95 00 |
| Bond No. 64—amount, | 100; | sold at 95c.; am't realized-- | 95 00 |
| Bond No. 65—amount, | 100; | sold at 95c.; am't realized-- | 95 00 |
| Bond No. 84—amount, | 500; | sold at 95c.; am't realized-- | 475 00 |
| Bond No. 85—amount, | 500; | sold at 95c.; am't realized-- | 475 00 |
| Bond No. 86—amount, | 500; | sold at 95c.; am't realized-- | 475 00 |
| Bond No. 87—amount, | 500; | sold at 95c.; am't realized-- | 475 00 |
| Bond No. 88—amount, | 500; | sold at 95c.; am't realized-- | 475 00 |
| Bond No. 89—amount, | 500; | sold at 95c.; am't realized-- | 475 00 |
| Bond No. 92—amount, | 1,000; | sold at 95c.; am't realized-- | 950 00 |
| Total sold G. H. M., | $5,000 | Total am't realized---- | $4,750 00 |

To F. A. Engelke, Brenham, Texas:

| | | | |
|---|---|---|---|
| Bond No. 66—amount, | $100; | sold at 95c.; am't realized-- | 95 00 |
| Bond No. 67—amount, | 100; | sold at 95c.; am't realized-- | 95 00 |
| Bond No. 68—amount, | 100; | sold at 95c.; am't realized-- | 95 00 |
| Bond No. 69—amount, | 100; | sold at 95c.; am't realized-- | 95 00 |
| Bond No. 70—amount, | 100; | sold at 95c.; am't realized-- | 95 00 |
| Bond No. 71—amount, | 100; | sold at 95c.; am't realized-- | 95 00 |
| Bond No. 72—amount, | 100; | sold at 95c.; am't realized-- | 95 00 |
| Bond No. 73—amount, | 100; | sold at 95c.; am't realized-- | 95 00 |
| Am't forward-- | $800 | Am't forward------ | $760 00 |

61

| | | | |
|---|---|---|---|
| Bro't for'd----- | $800 | Bro't for'd ---------- | $760 00 |
| Bond No. 74—amount, | 100; | sold at 95c.; am't realized-- | 95 00 |
| Bond No. 75—amount, | 100; | sold at 95c.; am't realized-- | 95 00 |
| Bond No. 82—amount, | 500; | sold at 95c.; am't realized-- | 475 00 |
| Bond No. 83—amount, | 500; | sold at 95c.; am't realized-- | 475 00 |
| Total sold to F. A. Engelke------ | $2,000 | Total amount realized from sale ---------- | $1,900 00 |

| | | |
|---|---|---|
| Total am't of bonds sold---------- | | $12,000 00 |
| " " realized from sale of same-------- | $11,400 | |
| " " of discount on $12,000, at 5% ---- | 600 | |
| | | $12,000 00 |

**Bonds still remaining in the hands of the mayor as follows:**

| | |
|---|---|
| From No. one (1) to No. fifty (50), inclusive, for the amount of fifty ($50) dollars each | $2,500 |
| No. fifty-one (51) to No. fifty-five (55), inclusive, for the amount of one hundred ($100) dollars each | 500 |
| Total | $3,000 |

Which have been deposited with Messrs. Giddings & Giddings for safe keeping, and whose receipt I now have for same.

Respectfully submitted for examination and approval.

M. P. KERR, *Mayor.*

The report of the mayor as above was examined, approved, and adopted.

On motion, the blank coupons No. 1, which had been cut from the bonds before selling, and which had been printed for the purpose of including interest to Sept. 1st, 1879, and which interest the city does not have to pay, owing to advancement made by
62 Messrs. Giddings & Giddings, were referred to the finance committee, and they were instructed to examine the same, and, if found correct, to destroy them."

9. Defendant also introduced in evidence the following ordinance of the city of Brenham:

"An ordinance to amend an ordinance entitled 'An ordinance designating the line of the Gulf, Colorado and Santa Fé railroad through the city and granting the right of way to said road,' approved June 26th, 1879.

"Be it ordained by the city council of the city of Brenham:

"SEC. 1. That an ordinance entitled 'An ordinance designating the line of the Gulf, Colorado and Santa Fé railroad through the city and granting the right of way to said road,' approved June 26th, 1879, be so amended *so* as to hereafter read as follows:

"SEC. 2. That the following line be, and the same is hereby, designated for the line of the Gulf, Colorado and Santa Fé railroad through the city of Brenham: Beginning at a point in the southern boundary line of the corporation of the city of Brenham within a tract of land of Mrs. Louisa Stone, thence through that portion of said tract which lies within the corporation of the city of Brenham; thence through J. B. Vanness' tract of land; thence through Miller & Perry's tract of land; thence through lot of Mrs. M. A. Day and Mollie Daffin; thence through James Smelser's lot; thence through Am-
63 brose Petty's lot; thence through James H. Simmons' lot, being part of block No. 1, in Wilkin's addition to the city of Brenham; thence through W. G. Wilkin's lot, also being a part of said block No. 1, said addition, crossing Jackson street; thence through W. A. Wood's two lots, one being lot No. 1, in block

No. 2, Wilkin's said addition, the other being lot No. 2, in block No. 11, in Key's first addition to the city of Brenham; thence through J. B. McFarland's lot, being lot No. 1, in block No. 11, in Key's first addition, crossing Fourth street; thence through H. L. McClung's lot, being lot No. 2, in block 10, in Key's first addition; thence through the S. E. corner of J. W. Bostick's lot, being lot No. 1, in block No. 10, in Key's first addition, crossing Key's street; thence through James Estes' lot, being lot 4, in block 6, in Key's first addition, crossing Third street; thence through Mrs. E. M. Barrett's two lots, being lots Nos. 3 and 4, in block 7, in Key's first addition; thence crossing the N. W. corner of J. N. Brown's lot, being lot No. 2, in block No. 7, in Key's first addition; thence through J. L. Moore's lot, being lot No. 1, block 7, in Key's first addition, crossing Second street; thence through C. F. Ross' lot, being lot No. 2, in block No. 8, in Key's first addition, crossing Day street; thence through M. M. Bain's lot, being lot No. 3, in block 1, in Key's first addition;
64 thence through A. Simon's lot, being lot No. 4, in block 1, in Key's first addition, which two last named, to wit, A. Simon's lot and M. M. Bain's lot, are also hereby designated as the grounds for the freight depot of said railroad company; thence crossing First street; thence through Louis Brown's lot; thence crossing Central railroad track; thence through P. H. Swearingen's lot; thence through lot known as the House property. The last two named lots, to wit, P. H. Swearingen's lot and the lot known as the House property, are also hereby designated as the ground for the passenger depot of said railroad company; thence crossing Peabody street; thence through T. A. Low's lot; thence through O. Crozier's lot, crossing Sandy street; thence through D. W. Bloombargh's lot, there intersecting what is known and recognized as West street, in the city of Brenham; thence with said street to Higgin's branch, the termination of said street, crossing said branch; thence through Higgin's farm, which is the northern boundary line of the corporation of the city of Brenham.

"SEC. 3. The said right of way through the city of Brenham is hereby granted to the Gulf, Colorado and Santa Fé Railroad Company, said right of way to be as wide as is necessary for the proper construction of said railroad.

"SEC. 4. The committee, composed of members of the city
65 council and cititizens heretofore appointed by the city council, are hereby authorized and instructed to purchase the necessary property for depot grounds for said railroad company in the city, and such other property along the line of said railroad through the city as may be necessary for right of way.

"SEC. 5. Authority is hereby given to said railroad company to condemn such property along said line as may be necessary for said right of way in all cases where owners of property and said committee cannot agree upon a price for said property.

"SEC. 6. Said committee shall take all titles and have deeds executed to the city of Brenham, and shall report all purchases made by them and turn over all title papers to the city council.

"SEC. 7. The sum of ten thousand ($10,000) dollars, or so much

thereof as may be necessary, is hereby appropriated for the purchase of said right of way and depot grounds, and the mayor and secretary shall draw a warrant therefor in favor of the chairman of said committee whenever requested to do so.

"SEC. 8. All ordinances and parts of ordinances in conflict with this ordinance be, and the same are hereby, repealed, and this ordinance shall take effect from and after the date of its passage.

"Approved September 17th, 1879.

"M. P. KERR, *Mayor.*

"Attest:

C. H. CARLISLE, *Secretary.*"

66 10. It was also proved that $3,000 of the bonds issued as aforesaid by the city of Brenham were used by the city for fire department purposes.

11. Defendant further proved that depot grounds in and right of way through the city of Brenham were bought for the Gulf, Colorado and Santa Fé Railroad Company with money realized from the sale of bonds issued under the ordinance of June 7th, 1879.

12. Defendant further proved that G. H. Mensing knew of the suit of Dwyer *v.* Hackworth, reported in the 57 Texas Reports, at the date of its institution, in March, 1881, and that he then first learned of trouble about the bonds. Defendant further proved that June 11th, 1882, said G. H. Mensing read the following syllabus of the opinion rendered by the supreme court of Texas in said suit:

"The Higher Courts.

"*Synopsis of the Opinions of the Appellate Courts.*

"Austin. Term, 1882, June.

"Reported by David H. Hewlett, of the Austin bar.

"Supreme Court.

"DWYER *vs.* HACKWORTH.

"From Washington county.

"The city of B. having assumed control of her public schools, the council in 1880 had authority to submit to a vote of the property tax-payers the proposition to raise, by taxation, such an amount in addition to that derived from the State as would be necessary for the conduct of the free schools for ten months, not to exceed one-half of 1 per cent. The result of said election being duly canvassed and declared and no proceeding having been instituted to contest the election, it is not competent to
67 have said result inquired into in this suit. The city council, by virtue of the affirmative vote of the tax-payers, were authorized to levy a tax not to exceed one-half of one per cent., and the discretion of the council in fixing such necessary amount will not

be revised. Under the assumed control of the public schools, public school-houses within the city limits became public buildings, and a tax of one-quarter of one per cent. for their erection is valid. The charter authorizing the borrowing of money, which was done by the issue of bonds, the validity of a tax to pay interest thereon is not affected by a subsequent appropriation to an unauthorized purpose. The charter provides that whenever the property-owners and assessor could not agree on the valuation of the property to be assessed such valuation should be fixed by the committee on assessment. After the property-owner in this case had rendered and the assessor had accepted the valuation, this committee, without the knowledge or consent of the tax-payer, increased the valuation: Held, that this action of the committee was illegal and void.

"Gould, C. J."

Defendant proved that G. H. Mensing, June 11, 1882, cut out said syallabus and preserved it.

13. Defendant further proved the existence of the following paragraph, contained in the agreed facts set out in the record of the case, decided at Austin, Texas, appealed from Brenham, Washington county, Texas, upon which the case of Dwyer *vs.* Hackworth was tried: "August 18th, 1879, the mayor of the city reported to the city council that $12,000.00 of the coupon bonds of the city, issued under the bond ordinance of June 7th, 1879, had been sold at a dis-
68 count of 5 %, the amount realized therefrom being $11,400.00, and that there remained on hand unsold $3,000.00 of the bonds issued under said ordinance. The proceeds of $10,000.00 of the bonds so sold was applied, as directed in the ordinance of June 26th, to the purchase of the land in said city for the right of way and depot grounds of the Gulf, Colorado and Santa Fé Railroad Company on which the railroad and depot buildings of said company were constructed and built, and also to pay damages caused by construction of said railroad to the owners of property abutting on said right of way, assessed against said railroad company."

Defendant further proved that the bonds had never been registered by the comptroller, and that at the time plaintiff acquired the bonds to which the coupons were attached and the aforenamed clipped coupons three coupons belonging to each bond were past due. The defendant offered the above testimony in connection with that introduced by plaintiff for the following purposes:

1. To show that the bonds described in plaintiff's petition and the coupons in suit were issued for the real purpose of purchasing right of way and depot grounds for the Gulf, Colorado and Santa Fé Railroad Company in and through the city of Brenham.

2. To show that the resources of the city at the time of the passage of the bond ordinance of June 7th, 1879, and at date of issuance of the bonds, on the 31st day of July, 1879, were barely sufficient to provide for the current expenses of the city for the fiscal year
69 beginning April 1, 1879, and that such resources were wholly insufficient to meet such current expenses and provide for

the payment of interest on the bonds and to provide for a sinking fund to pay the principal, as required by law.

3. To show that said bonds had not been registered with the comptroller of the State, and that said officer had never indorsed on the same his certificate of registration.

4. To trace notice to said G. H. Mensing of the unlawful purpose for which the bonds and coupons were issued, and to show that plaintiff was not the owner of the same, but merely held the same in pledge to secure an indebtedness due by Mensing, and that plaintiff was not a *bona fide* holder; but, upon objection by plaintiff's counsel, the court only admitted the testimony for the purpose of showing how far it would affect Mensing with notice of the unlawful purpose for which the bonds and coupons were issued, and upon the question of notice to Mensing the court limited the right of defendant to assail the validity of the coupons to the *coupons* which were overdue at the time they were deposited with plaintiff, the court holding that, as to the coupons not due at the time they were received by plaintiff, Mensing's knowledge of the unlawful purpose of the bonds was immaterial and would not affect plaintiff's right to recover thereon. For all other purposes than that above mentioned the court excluded the testimony from the jury.

To which ruling of the court the defendant, by its counsel, then and there in open court excepted, and tenders this its bill of
70 exceptions, the same having been first submitted to counsel for plaintiff, and asks now here in open court that the same be allowed and authenticated by the signature of the judge trying said cause, which is accordingly done, in open court, this the 27th day of April, A. D. 1888.

ALECK BOARMAN, *Judge.*

(Indorsed :) No. 2092. The German-American Bank *vs.* The City of Brenham. Defendant's bill of exceptions No. 3. Filed April 27th, 1888. D. H. Hart, clerk.

*Defendant's Bill of Exceptions No.* 4. *Filed April 27th*, 1888.

United States Circuit Court, at Austin. Adjourned Term, April, 1888.

THE GERMAN-AMERICAN BANK *vs.* THE CITY OF BRENHAM. } No. 2092.

Be it remembered that upon the trial of the above-entitled cause the following proceedings were had:

After the pleadings of the parties were read and the testimony set forth in defendant's bill of exceptions No. 3 had been admitted in evidence for the purpose as held by the court, the plaintiff then offered in evidence testimony showing—

1. That all the coupons on said bonds up to and including September 1st, 1882, had been paid by defendant.

2. That on March 21st, 1884, defendant, through its finance com-

mittee, issued and published a financial statement of the city as follows:

"*City Financial Statement.*

71 "Special meeting of the city council, held March 21, 1884, for the purpose of receiving the annual statement of the financial committee.

"Officers present: J. A. Wilkins, mayor; Aldermen J. R. Williamson, C. C. Garrett, and L. S. Deckard.

"The financial committee presented the following annual statement:

"To the honorable mayor and board of aldermen of the city of Brenham:

"The finance committee beg leave to submit their annual statement of the receipts, expenditures, etc., for the municipal year ending Tuesday, April 1, 1884, and ask that the same be spread upon the minutes and published, as required by law.

"Under the head of 'receipts in general fund' will be found 'warrants outstanding,' $255.70; this embraces $250.00 issued for streets, which matures in five annual installments from May 1, 1884. There is also outstanding, maturing in eight annual installments from 1883, the sum of $1,165, issued for streets prior to May 15, 1883, and against the street fund proper there is $200.00, maturing in four payments, reported as warrants outstanding.

"There is $1,263.00 against 'building fund,' issued for school furniture, that is not due for twelve months.

"The committee have omitted from schedule of liabil- the amount ascertained to be due the Gulf, Colorado and Santa Fé Railroad Company by ordinance Febuary 28, 1881 (Min., p. 223), in accordance with the resolution of the council July 24, 1879 (Min., p. 60), to wit, $8,800.00, because the same is to be paid, without interest, from the taxes assessed against the said company, which amount
72 practically only to an exemption from general taxes. Said sum should be credited with taxes of 1881, $42.20; 1882, $55.35, and 1883, $61.99.

"J. R. WILLAIMSON,
"C. C. GARRETT,
"*Fin. Com.*

"Brenham, March 21, 1884.

"*General Fund.*

"Receipts:

| | |
|---|---|
| "To occupation tax | $4,264 90 |
| " " ad valorem tax | 4,742 18 |
| " " dog tax | 105 60 |
| " " vehicle tax | 192 00 |
| " " warrants outstanding | 255 70 |
| " " warrants between March 15 & May 1, 1883, regist'd | 302 43 |
| | $9,862 81 |

"Disbursements:

| | | |
|---|---|---|
| "By deficit March 15, 1883 | | $26 81 |
| " " salaries, officers | | 1,122 18 |
| " " salaries, police | | 1,884 01 |
| " " scavenger | | 752 50 |
| " " fire department | | 771 30 |
| " " incidentals | | 1,066 29 |
| " " printing | | 100 00 |
| " " streets | | 490 00 |
| " " vehicle tax refunded | | 99 00 |
| " " interest on bonds | | 250 00 |
| " " G., C. & S. F. R'y Co. | | 61 99 |
| " " commission, A. & C. assessment | | 141 25 |
| " " error favor of A. & C. | | 4 98 |
| " " old warrants paid | | 876 62 |
| " " balance on hand | | 2,215 88 |
| | | $9,862 81 |

73 "*School Fund.*

"Receipts:

| | |
|---|---|
| "To cash on hand March 15, 1883 | $1,674 78 |
| " " ad valorem tax | 5,727 42 |
| " " poll tax | 397 48 |
| " " tuition | 718 06 |
| " " rent Wash. Co. school lands | 583 51 |
| " " J. W. Hackworth, injunction case | 88 18 |
| " " Bassett & Bassett, estimate cotton crop | 50 00 |
| " " State board education | 4,104 00 |
| | $13,343 43 |

"Disbursements:

| | |
|---|---|
| "By teachers' salaries | $8,127 50 |
| " " janitor and rent | 225 75 |
| " " sundries | 656 04 |
| " " lumber | 99 50 |
| " " insurance | 337 27 |
| " " com., A. & C., for assessment | 135 00 |
| " " error against A. & C. | 2 48 |
| " " error | 1 45 |
| " " cash on hand | 3,758 46 |
| | $13,343 43 |

mittee, issued and published a financial statement of the city as follows:

"*City Financial Statement.*

71 "Special meeting of the city council, held March 21, 1884, for the purpose of receiving the annual statement of the financial committee.

"Officers present: J. A. Wilkins, mayor; Aldermen J. R. Williamson, C. C. Garrett, and L. S. Deckard.

"The financial committee presented the following annual statement:

"To the honorable mayor and board of aldermen of the city of Brenham:

"The finance committee beg leave to submit their annual statement of the receipts, expenditures, etc., for the municipal year ending Tuesday, April 1, 1884, and ask that the same be spread upon the minutes and published, as required by law.

"Under the head of 'receipts in general fund' will be found 'warrants outstanding,' $255.70; this embraces $250.00 issued for streets, which matures in five annual installments from May 1, 1884. There is also outstanding, maturing in eight annual installments from 1883, the sum of $1,165, issued for streets prior to May 15, 1883, and against the street fund proper there is $200.00, maturing in four payments, reported as warrants outstanding.

"There is $1,263.00 against 'building fund,' issued for school furniture, that is not due for twelve months.

"The committee have omitted from schedule of liabil- the amount ascertained to be due the Gulf, Colorado and Santa Fé Railroad Company by ordinance Febuary 28, 1881 (Min., p. 223), in accordance with the resolution of the council July 24, 1879 (Min., p. 60), to wit, $8,800.00, because the same is to be paid, without interest, from the taxes assessed against the said company, which amount
72 practically only to an exemption from general taxes. Said sum should be credited with taxes of 1881, $42.20; 1882, $55.35, and 1883, $61.99.

"J. R. WILLAIMSON,
"C. C. GARRETT,
"*Fin. Com.*

"Brenham, March 21, 1884.

"*General Fund.*

"Receipts:

| | |
|---|---|
| "To occupation tax | $4,264 90 |
| " " ad valorem tax | 4,742 18 |
| " " dog tax | 105 60 |
| " " vehicle tax | 192 00 |
| " " warrants outstanding | 255 70 |
| " " warrants between March 15 & May 1, 1883, regist'd | 302 43 |
| | $9,862 81 |

"Disbursements:

| | | |
|---|---|---|
| "By deficit March 15, 1883 | | $26 81 |
| " " salaries, officers | | 1,122 18 |
| " " salaries, police | | 1,884 01 |
| " " scavenger | | 752 50 |
| " " fire department | | 771 30 |
| " " incidentals | | 1,066 29 |
| " " printing | | 100 00 |
| " " streets | | 490 00 |
| " " vehicle tax refunded | | 99 00 |
| " " interest on bonds | | 250 00 |
| " " G., C. & S. F. R'y Co. | | 61 99 |
| " " commission, A. & C. assessment | | 141 25 |
| " " error favor of A. & C. | | 4 98 |
| " " old warrants paid | | 876 62 |
| " " balance on hand | | 2,215 88 |
| | | $9,862 81 |

73 "*School Fund.*

"Receipts:

| | |
|---|---|
| "To cash on hand March 15, 1883 | $1,674 78 |
| " " ad valorem tax | 5,727 42 |
| " " poll tax | 397 48 |
| " " tuition | 718 06 |
| " " rent Wash. Co. school lands | 583 51 |
| " " J. W. Hackworth, injunction case | 88 18 |
| " " Bassett & Bassett, estimate cotton crop | 50 00 |
| " " State board education | 4,104 00 |
| | $13,343 43 |

"Disbursements:

| | |
|---|---|
| "By teachers' salaries | $8,127 50 |
| " " janitor and rent | 225 75 |
| " " sundries | 656 04 |
| " " lumber | 99 50 |
| " " insurance | 337 27 |
| " " com., A. & C., for assessment | 135 00 |
| " " error against A. & C. | 2 48 |
| " " error | 1 45 |
| " " cash on hand | 3,758 46 |
| | $13,343 43 |

"*Building Fund.*

"Receipts:

| | |
|---|---|
| "To cash on hand March 15, 1883 | $5,811 98 |
| " " ad valorem tax | 4,677 22 |
| " " J. W. Hackworth, injunction case | 44 09 |
| " " Germania Volksfest | 100 44 |
| " " warrants outstanding | 3,282 00 |
| " " error | 24 |
| | $13,915 97 |

74 "Disbursements:

| | |
|---|---|
| "By amount for school-house | $10,889 50 |
| " " school furniture | 1,263 00 |
| " " repairs | 165 76 |
| " " interest on warrants | 33 76 |
| " " commission, A. & C., for assessment | 102 94 |
| " " cash on hand | 1,461 01 |
| | $13,915 97 |

"*Special-Debt Fund.*

"Receipts:

| | |
|---|---|
| "To cash on hand March 15th, 1883 | 15 22 |
| " " ad valorem tax | 1,376 28 |
| | $1,391 50 |

"Disbursements:

| | |
|---|---|
| "By registered warrants paid | 812 99 |
| " " cash on hand | 578 51 |
| | $1,391 00 |

"(NOTE.—The above fund is for the payment of warrants issued prior to May 1, 1883, which are required to be registered and paid in the order of registration.)

"*Street Fund.*

"Receipts:

| | |
|---|---|
| "To cash on hand March 15th, 1883 | 47 59 |
| " " fines in mayor's court, Doran | 75 50 |
| " " fines in mayor's court, Harvin | 1,285 97 |
| " " vehicle license | 127 68 |
| " " warrants outstanding | 281 24 |
| | $1,817 98 |

75 "Disbursements:

| | |
|---|---|
| "By lumber | 720 48 |
| " " gas | 205 49 |
| " " sundries | 39 55 |
| " " streets | 380 00 |
| " " old warrants paid | 307 93 |
| " " cash on hand | 164 53 |
| | $1,817 98 |

"*Liabilities.*

| | |
|---|---|
| "Bonds of 1879, 5-20, 10's | $15,000 00 |
| "Accrued interest | 3,750 00 |
| "Registered warrants (general fund) | 2,470 00 |
| "Old unregistered warrants | 234 00 |
| "Warrants for streets—not due | 1,165 00 |
| "Warrants outstanding (general fund) | 255 70 |
| "Warrants outstanding (building) | 2,019 00 |
| "Warrants outstanding (furniture) | 1,263 00 |
| "Excess of assets | 4,700 92 |
| | $30,908 19 |

"*Assets.*

| | |
|---|---|
| "Delinquent tax, 1880–'1 | 469 33 |
| "Delinquent tax, 1882, general fund | 94 27 |
| "Delinquent tax, 1882, school fund | 94 27 |
| "Delinquent tax, 1882, building fund | 94 27 |
| "Delinquent tax, 1883, general fund | 632 65 |
| "Delinquent tax, 1883, school, ad val | 798 98 |
| "Delinquent tax, 1883, school, poll | 91 13 |
| "Delinquent tax, 1883, building | 632 65 |
| "Delinquent tax, 1883, special debt | 255 20 |
| "School house and grounds | 15,000 00 |
| "City hall | 2,664 00 |
| "Forward | |
| 76 "Cistern and well | 938 00 |
| "Two horses | 215 00 |
| "Carts, harness, and tools | 150 00 |
| "Lamps and posts | 600 00 |
| "Cash to credit school fund | 3,758 46 |
| "Cash to credit general fund | 2,215 88 |
| "Cash to credit building fund | 1,461 01 |
| "Cash to credit special-debt fund | 578 51 |
| "Cash to credit street fund | 164 53 |
| | $30,908 19 |

"Approved March 21, 1884.

"J. A. WILKINS,
"*Mayor of Brenham.*"

"On motion, the statement was received, approved, and ordered spread on the minutes and printed.

"There being no further business, the council adjourned.

"H. C. McINTYRE, *Sec.*"

3. That C. C. Garrett, city attorney, wrote a letter on April 21, 1884, to Henry Sayles, Esq., as follows:

"EXHIBIT D.

"C. C. Garret, law office.

"BRENHAM, TEXAS, *April* 21, 1884.

"Henry Sayles, Esq., Galveston.

"DEAR SIR: Yours 19th inst. received. The city administration, as at present constituted, recognizes the validity of the bonds and will do what it can to pay them.

"When I came into office as alderman, one year ago, no interest had been paid for two years and the finances of the city were
77 in a bad condition. We have retrieved the finances by cutting down salaries and registering old warrants. Under constitution as amended we levied a tax of 10c. to pay old indebtedness, but the amount was insufficient to pay off registered warrants. The accumulated interest on the bonds will come in next. In the meantime we will pay an amount equal to annual interest out of the general fund. We have paid our semi-annual installment, and in a few days will pay another. In our budget for 1884 we allow on general fund $1,800.00 for int. and sinking fund on bonds. We intend to pay the bonds. They are redeemable this year, and we will try to raise the money at a less per cent. and take them up. I think we can probably get it at six per cent. There will be a balance in the "debt fund" of this year after paying registered warrants, which we will apply to matured coupons.

"Yours very truly, C. C. GARRETT."

Defendant, by its counsel, at the time objected to the testimony upon the grounds: 1. That neither the acts of its officers or agents or of its common council were sufficient to estop defendant from setting up the invalidity of the bonds and coupons. 2. The city being without power to issue bonds and coupons, neither the subsequent action of the council nor the conduct nor action of the city officers would amount to a ratification of the illegal act in the issuance of the bonds and coupons, and hence the testimony became irrelevant and immaterial; but the court overruled tbe objections and admitted the testimony; to which ruling of the court the defendant then and there in open court excepted, and tenders
78 this its bill of exceptions, the same having been first submitted to counsel of plaintiff, and asks now, here in open court, that the same be allowed and authenticated by the signature of the judge trying said cause, which is accordingly done, in open court, this 27th day of April, A. D. 1888.

ALECK BOARMAN, *Judge.*

(Indorsed:) No. 2092. German-American Bank *vs.* The City of Brenham. Defendant's bill of exceptions No. 4. Filed April 27th, 1888. D. H. Hart, clerk.

*Defendant's Bill of Exceptions No. 5. Filed Ap'l 27, 1888.*

United States Circuit Court, Western District of Texas, at Austin.
Adjourned Term, Ap'l, 1888.

THE GERMAN-AMERICAN BANK *vs.* THE CITY OF BRENHAM.

Be it remembered that upon the trial of the above-entitled cause the following proceedings were had:

The court, after the evidence was submitted as ascertained and recited in defendant's bill of exceptions No. 3, among other things, charged the jury as follows:

"By way of further defense, the defendant contends that the city did not comply with that article of the constitution which provides that all cities before incurring a debt shall provide by ordinance for securing the payment of the interest thereon and for a sinking fund to pay the principal, and therefore the plaintiff was charged with knowledge of their invalidity.

79 "The plaintiff relies on the following ordinance to show compliance with the requirements of the constitution:

"'SEC. 7. That there be, and is hereby, appropriated out of the general ad valorem tax of the city one-eighth of one per cent., or so much thereof as may be necessary, on the assessed value of the taxable property of the city as a special interest and sinking fund with which to pay the interest on said bonds and liquidate the same, and said fund shall be kept separate from the other funds of the city and shall be used for no other purpose.

"'SEC. 8. That this ordinance go into effect and have force from and after its passage.'

"I charge you that the ordinance read to you, in connection with the other ordinances that I shall not read to you, shows a substantial and sufficient compliance with the law, and on this defense you will find for plaintiff."

Thereupon the defendant, by its counsel, at the time and before the jury retired, excepted in open court to the foregoing charge, on the ground that, in view of the evidence as recited in defendant's bill of exceptions No. 3, and in view of the constitutional provisions of Texas, it was contrary to law; and defendant, before the retirement of the jury, requested the court to give the following special instruction in charge to the jury:

*Fourth Special Charge Requested by Def'd't.*

80 "If from the evidence the jury believe that at the date of the issuance of the coupons in suit and the bonds to which they were attached the assessable property of the city of Brenham

was not sufficient in amount to enable the city by the imposition of lawful taxes to raise revenues sufficient to provide for its current expenses, and to further provide for the payment of interest on the bonds and for providing a sinking fund of at least two (2) per cent. to pay the bonds at maturity, then you are charged that the city has no power to issue the coupons in suit and the bonds to which they were attached, and in this event you will find for the defendant."

Which said special charge so requested by defendant the court refused to give; to which action of the court in giving said charge and refusing to give the special instruction requested by defendant the defendant then and there, in open court and before the jury retired, excepted, and tenders this its bill of exceptions, the same having been first submitted to counsel for plaintiff, and asks now, here in open court, that the same be allowed and authenticated by the signature of the judge trying said cause, which is accordingly done, in open court, this the 27th day of April, A. D. 1888.

ALECK BOARMAN, *Judge.*

(Indorsed:) No. 2902. German-American Bank *vs.* The City of Brenham. Defendant's bill of exceptions No. 5. Filed April 27th, 1888. D. H. Hart, clerk.

81 *Defendant's Bill of Exceptions No.* 6. *Filed April 27th*, 1888.

United States Circuit Court, at Austin. Adjourned Term, Ap'l, 1888.

THE GERMAN-AMERICAN BANK *vs.* THE CITY OF BRENHAM. } No. 2092.

Be it remembered that upon the trial of the above entitled and numbered cause, the pleadings of the parties, plaintiff and defendant, being as set out elsewhere in the record and the evidence being as recited in defendant's bill of exceptions No. 3, the court thereupon instructed the jury, among other things, in substance, as follows: That the ordinance under which the bonds were issued disclosed that they were to be issued and sold for a lawful purpose, and the bonds issued thereunder and purchased by Mensing recited a lawful purpose and are valid bonds, unless the jury believe that they were actually issued and sold for an unlawful purpose, and that Mensing knew of or had knowledge of the unlawful purpose for which they were issued at the time he purchased them, and that the city having substantially made, by the ordinance, provisions for the interest and sinking fund, the fact that there was an insufficient amount provided by the ordinance would not invalidate the bonds.

To which charge of the court the defendant then and there, in open court, before the retirement of the jury, excepted, because the the same was contrary to law; and, in the same connection, with the view of correcting the above-assigned errors in the charge of the court and before the retirement of the jury, the defendant requested the court to give, in charge to the jury, the following special

82 instructions:

*"Special Charge No. 1 Asked by the Defendant.*

"If from the evidence the jury believe that at the time the plaintiff acquired the coupons upon which this suit is brought some of the coupons were past due, then you are instructed that the defendant may avail itself against plaintiff of any equities or defenses which would defeat a recovery thereon; and, in this connection, you are further instructed that if from the evidence you believe that the bonds with the coupons attached were, in fact, issued for the purpose of extending aid to the Gulf, Colorado and Santa Fé R. R. Co. by purchasing and donating to it the right of way and depot grounds through and in the city of Brenham, or if you believe from the evidence that the bonds to which the coupons in suit were attached were sold and the proceeds used in the purchase of right of way and depot grounds for said R. R. Co., then you will, as to such of the coupons as were past due at the time plaintiff acquired same, find for the defendant."

*"Special Charge No. 2 Asked by Defendant.*

"If from the evidence the jury believe that prior to acquisition by plaintiff from Mensing of the bonds and coupons testified to by J. H. Mensing and by the president and cashier of the plaintiff bank Mensing, prior to or at the time of his purchase or purchases, knew or was in possession of facts from which he might have known that the bonds were really issued in aid of the G., C. and S. F. R. R. Co. and for its benefit, or that the proceeds of the sale of said bonds were appropriated by the city to the purchase of depot grounds and right of way for said R. R. Co. and Mensing, with such knowledge
83 or means of knowledge, bought said bonds and subsequently transferred part of same to plaintiff for value, with overdue coupons attached, then you are instructed that as to all of the coupons attached to the bonds on which were the overdue coupons and as to the overdue coupons themselves the plaintiff is charged with notice of their invalidity and cannot recover."

*Special Charge No. 3 Asked by Defendant.*

"If from the evidence the jury believe that at the date of the issuance of the bonds to which the coupons in suit were attached the current expenses of the city of Brenham were equal to or in excess of the annual revenue accruing to it by taxation, then you are instructed that the issuance of said bonds was illegal and void, and you will return a verdict for the defendant."

But the court refused to give said special instructions or any of them; to which action of the court in charging as aforesaid and in refusing the aforesaid special instructions the defendant then and there, in open court and before the jury had retired, excepted, and tenders this its bill of exceptions, the same having been first submitted to counsel for plaintiff, and now here asks in open court that

the same be allowed and authenticated by the signature of the judge trying said cause, which is accordingly done, in open court, this 27th day of April, A. D. 1888.

ALECK BOARMAN, *Judge.*

84 (Indorsed:) No. 2092. The German-American Bank *vs.* The City of Brenham. Defendant's bill of exceptions No. 6. Filed April 27th, 1888. D. H. Hart, clerk.

*Defendant's Bill of Exceptions No.* 7. *Filed April* 27*th*, 1888.

The United States Circuit Court, Western District of Texas, at Austin. Adjourned Term, April, 1888.

THE GERMAN-AMERICAN BANK *vs.* THE CITY OF BRENHAM. } No. 2092.

Be it remembered that upon the trial of the above-entitled cause, the pleadings of the parties having been read and the evidence having been submitted, the court thereupon, among other things, instructed the jury as follows:

"Bonds to the amount of $15,000.00, with interest coupons attached, were issued in 1879 by the defendant city, then operating under the charter of 1873. In that charter section 2 says: 'That the city council shall have power and authority to borrow money for general purposes, not exceeding $15,000, fifteen thousand dollars, on the credit of the city.'

"The constitution of the State, 1876, allows such cities as Brenham to 'collect an annual tax to defray the expenses of their local government, not to exceed for any year one-fourth of one per cent.'

85 "The power in the city to borrow money carries with it the authority to issue bonds in this case. It may be that the limitation of the power to tax beyond one-fourth of one per cent. impairs the ability of the defendant to pay the bonds and coupons, but I do not think it denies the capacity of the corporation in 1879 to issue the bonds as commercial paper."

The defendant then and there, in open court, before the retirement of the jury, excepted to the charge above recited, upon the grounds—

1. That under the constitution of Texas the expense of carrying out the general governmental purposes of the defendant is to be defrayed by the levy of a tax and not by the issuance of bonds.

2. The bonds so issued by defendant are not clothed with the incidents of commercial paper, and defendant tenders this its bill of exceptions, the same having been first submitted to counsel for plaintiff, and now here asks in open court that the same be allowed and authenticated by the signature of the judge trying said cause, which is accordingly done, in open court, this the 27th day of April, A. D. 1888.

ALECK BOARMAN, *Judge.*

(Indorsed:) No. 2092. The German-American Bank *vs.* The City of Brenham. Defendant's bill of exceptions No. 7. Filed April 27th, 1888. D. H. Hart, clerk.

86 THE UNITED STATES OF AMERICA:

The President of the United States to the honorable judges of the circuit court of the United States for the fifth circuit and western district of Texas, at Austin, in said district, Greeting:

Because in the records and proceedings and also in the rendition of the judgment of a plea which is in said circuit court, before you, between the German-American Bank, plaintiff, and The City of Brenham, defendant, manifest errors hath happened to the said named defendant, who is plaintiff in error herein, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October next, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Samuel F. Miller, associate justice of the Supreme Court of the United States, this the 13th day of June, in the year of our Lord one thousand eight hundred and eighty-eight.

[The Seal of the U. S. Circuit Court, Western Dist. Texas, Austin.]

D. H. HART,
*Clerk of the Circuit Court of the United States for the Fifth Circuit and Western District of Texas, at Austin.*

Allowed by
DON A. PARDEE,
*U. S. Circuit Judge.*

[Endorsed:] #2092. (11) German-American Bank *vs.* City of Brenham. Writ of error. Issued June 13, 1888. D. H. Hart, clerk. Filed July 5th, 1888. D. H. Hart, clerk.

87 *Copy of Writ of Error Lodged for Defendant in Error. Filed July 5th*, 1888.

THE UNITED STATES OF AMERICA:

The President of the United States to the honorable judges of the circuit court of the United States for the fifth circuit and western district of Texas, at Austin, in said district, Greeting:

Because in the records and proceedings and also in the rendition of the judgment of a plea which is in said circuit court, before you, be-

tween The German-American Bank, plaintiff, and The City of Brenham, defendant, manifest errors hath happened to the said named defendant, who is plaintiff in error herein, and, being willing that error, if any hath happened, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October next, in the said Supreme Court to be then and there held, that, the records and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Samuel F. Miller, associate justice
88 of the Supreme Court of the United States, this the 13th day of June, in the year of our Lord one thousand eight hundred and eighty-eight.

[SEAL.] D. H. HART,
*Clerk of the Circuit Court of the United States for the Fifth Circuit and Western District of Texas, at Austin.*

Allowed by—
DON A. PARDEE,
*U. S. Circuit Judge.*

(Indorsed:) No. 2092. The German-American Bank *vs.* City of Brenham. Writ of error. Issued June 13th, 1888. D. H. Hart, clerk. Filed July 5th, 1888. D. H. Hart, clerk.

89 THE UNITED STATES OF AMERICA:

The German-American Bank, defendant in error, to Messrs. Davis & Davidson, its attorneys of record:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the fifth circuit and western district of Texas, at Austin, wherein The City of Brenham is plaintiff in error and The German-American Bank is defendant in error, to show cause, if any there be, why the judgment rendered against the plaintiff in error, as in said writ of error mentioned, should not be corrected and speedy justice should not be done to the parties in that behalf.

Witness the Honorable Samuel F. Miller, associate justice of the Supreme Court of the United States, this the 16th day of June, in the year of our Lord one thousand eight hundred and eighty-eight.

DON A. PARDEE, *U. S. Judge.*

Test with seal of the circuit court of the United States for the fifth circuit and western district of Texas, at Austin, this the 29 day of June, A. D. 1888.

[The Seal of the U. S. Circuit Court, Western Dist. Texas, Austin.]

D. H. HART,
*Clerk United States Circuit Court, at Austin.*

89½ [Endorsed:] #2092. (13.) German-American Bank *v.* City of Brenham. Citation in error. Issued June 29, 1888. D. H. Hart, clerk. Filed July 5th, 1888. Copy and time waived and service accepted of the within citation in error. July 2, '88. Davis & Davidson, att'ys for German-American Bank.

90 *Bond for Costs. Filed June 29th*, 1888.

In the United States Circuit Court, Fifth Circuit, Western District of Texas, at Austin.

THE GERMAN-AMERICAN BANK
*vs.*
THE CITY OF BRENHAM. } No. 2092.

Know all men by these presents that we, The City of Brenham and R. Hoffmann, Wm. Zeiss, and F. Kreutzlin, are held and firmly bound unto The German-American Bank, defendant in error in the above-entitled cause, in the full and just sum of one thousand ($1,000) dollars; to which payment, well and truly to be made to the said German-American Bank, we bind ourselves, our successors, heirs, executors, and administrators, jointly and severally, firmly by these presents.

In testimony whereof this instrument is executed in behalf of said plaintiff in error, The City of Brenham, by and through its mayor, J. A. Wilkins, and attested by its secretary, H. C. McIntyre, Jr., who hereto affixes its corporate seal, and the said R. Hoffmann, Wm. Zeiss, and F. Kreutzlin hereto sign their names and affix their seals (using scrawls) this the 16th day of June, A. D. 1888.

Whereas lately, at a circuit court of the United States for the fifth circuit, western district of Texas, holding sessions at Austin, in a suit between the said German-American Bank, a corporation organized and existing under and by virtue of the laws of the State of New York, plaintiff, and the said City of Brenham, a municipal corporation organized and chartered under and by laws of the State of Texas, defendant, a judgment was rendered on, to wit, the 26th day of April, A. D. 1888, in favor of said plaintiff, the said

91 German-American Bank, and against the said defendant, The City of Brenham, for the sum of fifty-five hundred and ten and $\frac{10}{100}$ ($5,510.10) dollars, with interest from date thereof at eight (8) per cent. per annum, and all costs of suit; and the said defendant, The City of Brenham, having prosecuted a writ of error to the Supreme Court of the United States to be holden at Washington on the second Monday of October next:

Now, the condition of the above obligation is such that if the said City of Brenham, plaintiff in error, shall prosecute its writ of error to effect and answer all costs if it shall fail to make good its plea, then this obligation shall be void; otherwise to remain in full force and effect.

J. A. WILKINS, *Mayor.*

Attest:
H. C. McINTYRE, *Secretary.*
June 16, 1888.

R. HOFFMANN. [SEAL.]
W. ZEISS. [SEAL.]
F. KREUTZLIN. [SEAL.]

Approved:
DON A. PARDEE,
*U. S. Circuit Judge.*

THE STATE OF TEXAS, *County of Washington:*

Before me, C. F. Herbst, clerk of the district court within and for said county and State, on this day personally appeared R. Hoffmann, Wm. Zeiss, and F. Kreutzlin, who, being solemnly sworn, deposes, each for himself, and says that he is solvent and has property subject to execution largely in excess of one thousand dollars, and that he signed as one of the sureties the foregoing writ-
92 of-error cost bond executed by the City of Brenham in the suit of The German-American Bank *vs.* The City of Brenham.

R. HOFFMANN.
W. ZEISS.
F. KREUTZLIN.

Sworn to and subscribed before me this the 16th day of June, A. D. 1888.

[SEAL.]

C. F. HERBST,
*Dist. Cl'k, W. Co., Tex.*

THE STATE OF TEXAS, *County of Washington:*

I, C. F. Herbst, clerk of the district court of Washington county, Texas, do hereby certify that each of the sureties on the above and foregoing writ-of-error bond, to wit, R. Hoffmann, Wm. Ziess, and F. Kreutzlin, is solvent, and that each of said sureties own property in excess of legal exemptions to an amount equal to one thousand dollars; and I further certify that if said bond were presented to me for approval in a suit pending in said district court I would approve the same.

Witness my hand and seal — office this the 16th day of June, A. D. 1888.

[SEAL.]

C. F. HERBST,
*Clerk District Court, Washington County, Texas.*

(Indorsed:) No. 2092. German-American Bank *vs.* City of Brenham. Bond for costs. Filed June 29th, 1888. D. H. Hart, clerk.

THE GERMAN-AMERICAN BANK
*vs.*
THE CITY OF BRENHAM. } No. 2092.

| | |
|---|---|
| To issuing 4 subpœnas, 1.00; 8 add'n'l names, 1.20 | 2 20 |
| To swearing jury, .35; swearing 10 witnesses, 1.00 | 1 35 |
| To filing 519 papers, 51.90; entering 1 order, .15 | 52 65 |
| To entering judgment, .75; docket fee, 3.00 | 3 75 |
| To certified copy cost bill, .50 | 50 |
| To certified copy of judgment for def't | 1 00 |
| To issuing 1st execution & return | 1 25 |
| To issuing writ of error & dupl. | 2 00 |
| To issuing citation in error & dupl. | 2 00 |
| To filing 7 papers, .70 | 70 |
| Transcript | 40 00 |
| Clerk's cost | $106 80 |

*Marshal's & Miscellaneous Fees.*

| | |
|---|---|
| J. T. Rankin, serving 11 subpœnas | $5 50 |
| J. T. Rankin, mileage on 1st execution | 5 75 |
| W. N. Brown, witness | 1 50 |
| Attorney's tax fee | 20 00 |
| Costs of Sam'l Hopkins (late clerk) | 27 40 |
| Total cost | $166 95 |

94 THE UNITED STATES OF AMERICA,
*Western District of Texas:*

I, D. H. Hart, clerk of the circuit court of the United States for the fifth circuit and western district of Texas, at Austin, do hereby certify that the foregoing pages contain a full, true, and correct copy of the record and of all proceedings as they appear on file and of record in this court in cause No. 2092, entitled German-American Bank *vs* City of Brenham, to which I have attached the original writ of error and citation in error, copies of which said writs are on file in my office.

In testimony whereof I have hereunto subscribed my name and affixed the seal of said circuit court on this the 18th day of August, A. D. 1888.

[The Seal of the U. S. Circuit Court, Western Dist. Texas, Austin.]

D. H. HART, *Clerk.*

Endorsed on cover: W. Texas C. C. U. S. No. 1136. The City of Brenham, plaintiff in error, *vs.* The German-American Bank. Filed September 26, 1888.

IN THE

# Supreme Court of the United States.

OCTOBER TERM, 1891.

THE CITY OF BRENHAM, Plaintiff in Error,
*vs.*
THE GERMAN AMERICAN ~~SAVINGS~~ BANK.
No. 120.

**Petition for Rehearing by the Defendant in Error.**

A. H. GARLAND and
H. J. MAY,
For Petitioners.

Press of McGILL & WALLACE, Washington, D. C.

IN THE

# Supreme Court of the United States.

OCTOBER TERM, 1891.

THE CITY OF BRENHAM, Plaintiff in Error,
*vs.*
THE GERMAN AMERICAN ~~SAVINGS~~ BANK.
No. 120.

**Petition for rehearing by the Defendant in Error.**

The defendant in error asks the court to grant a rehearing of this cause before a full bench consisting of nine justices, for the following reasons:

1. The decision of March 28, 1892, was concurred in by five justices only.

2. The decision destroys securities in which are invested a vast amount of the earnings of small depositors in the savings banks of the country; and it disastrously unsettles financial confidence.

3. It reverses the long-settled law of this country in respect to negotiable municipal bonds.

4. It announces the doctrine, that a power in express terms in a municipal charter "to borrow money" does not authorize the corporation to issue negotiable bonds as a means of carrying that power into effect—a doctrine that is unsound in principle.

5. The decision visits, with severity, your petitioner, who, in perfect good faith, with prudence and care, invested the trust money of its depositors, in what, at the time of the transaction, was universally regarded, under the decisions of this court, and of many of the State courts, as a form of negotiable security of the safest and best character.

## I.

**The Decision was concurred in by five Justices only.**

Were this a determination upon the facts of a controversy, that concerned private parties only, we admit that the circumstance that five justices are of one way of thinking, and three of the other, would have little weight upon an application for a rehearing.

But to an unusual extent this is a test case. The opinion of the court deals with the grave question, *what does the Legislature mean by granting to a municipal corporation a power to borrow money?* Not only this—it treats the subject at a late period in the history of municipal corporations, when the power has been exercised so often and so extensively as to create a practical interpretation, acquiesced in, accepted and acted upon in all parts of the country.

So firmly established as a rule of property has the ordinary business meaning of this term become, that a proposal to destroy that meaning, and practically to destroy its value, should have the benefit of the most deliberate opinion of every justice of the Supreme Court of the United States, when the court is at its maximum strength in point of numbers. This consideration, your petitioner submits, is urged not as a favor to the defendant in error, but as a reasonable privilege to be granted to that large body of citizens on the one hand, and investors on the other, who are vitally interested to have

so momentous a question determined by the full bench of nine justices.

The result in *Hepburn* v. *Griswold* was reached by five justices out of eight, *12 Wall., 528.* In the *Legal Tender Cases*, Mr. Justice Strong, speaking for the court, says of *Hepburn* v. *Griswold:* "That case was decided by a divided court, and by a court having a less number of judges than the law then in existence provided this court shall have. These cases have been heard before a full court, and they have received our most careful consideration. Even in cases involving only private rights, if convinced we had made a mistake, we would hear another argument and correct our error. And it is no unprecedented thing in courts of last resort, both in this country and in England, to overrule decisions previously made." (12 Wall., 554.)

True, this language was not used with reference to a rehearing, but the reasoning has equal, if not greater force, when applied to a petition seasonably made for a reargument.

Your petitioner laid chief stress at the argument on the effect of the constitution of Texas and legislation of that State subsequent to the charter of Brenham. Your petitioner does not affirm that the question of power to issue was passed by without sufficiently expressing the views of counsel, but counsel could not, and did not, doubt the power of the city to issue these bonds, and did not believe the point was an open one in any respect, or debatable before this court of all others, which had stood firmly and immovably upon this view of the matter, from the Commissioners of *Knox County* v. *Aspinwall, 21 How., 539*, in 1858, down to the present time in cases as numerous almost as colored eggs at Easter, in which this power had been called in question. Thus relying upon what was conceived to be settled by this court for all time, a mere general discussion of this point with citation of cases was had; and your

petitioner believes, that permission being given to argue this point before a full bench, certain considerations may be presented of great force that were not before brought to the attention of the court.

Nearly sixty years since, a practice was inaugurated in this court, which has been pretty generally followed, to require an opinion of the court, on all constitutional questions, to be concurred in by a majority of the whole court: (*8 Pet., 118 et seq.*) This case involves no constitutional question in the sense used in the cases in *8 Pet.*, but as we have seen, it involves questions of very great interest to the public, in which vast numbers of people are deeply concerned. Recently this court, after long and elaborate arguments in the *Union Pacific Railroad cases*, before seven judges, restored them to the docket to be heard before a "full bench consisting of nine justices;" and these cases present no constitutional question at all, but they do present matters of the highest importance to many people. Of course this is only an order for reargument before any decision, but it is apparent the reasons are alike and as persuasive for reargument after a decision. And this for the additional reason in this case: When it was argued last December (14th) the bench was full; that is, there were nine justices present. Mr. Justice Bradley, who died a short time after that, was much interested in the argument, asking many questions of counsel. After his death, on 26th January last, the case was restored and set for reargument, which was had on the 17th March last before eight justices. The parties were fairly entitled to the consideration and opinion of nine justices as the case was first heard before that number.

Again, *Rogers* v. *Burlington, 3 Wall., 654*, has stood the test of nearly thirty years' assault, directly and indirectly, but it—the result of the work of nine justices—went down in ruins before this opinion.

And *Mitchell* v. *Burlington, 4 Wall., 270*, only one year

later than *Rogers* v. *Burlington*, before nine justices—entire court—with no dissent, was torn up by the roots and swept away by this decision.

It is submitted the reasons are manifest and conclusive, a rehearing should be had before this court, with the full number of justices present at and participating in the rehearing.

## II.

**The Decision destroys securities in which are invested a vast amount of the earnings of small depositors in the Savings Banks of the Country; and it disastrously unsettles Financial Confidence.**

That the effect of this decision, if the doctrine announced in the opinion is adhered to, will be disastrous hardly admits of a doubt. Bonds are already in the hands of innocent holders, the money long ago lent. That a large amount of this species of security is held by savings institutions is a fact perfectly well known. That reinvestment in like securities is rendered perilous can not be denied.

It may be said that courts are bound to decide according to law, be the consequences what they may. So they are; but in determining what the law is, in doubtful cases, from Coke's day to this, courts have viewed closely and anxiously the consequences of certain interpretations, and avoided such as would bring trouble and disaster, especially where that interpretation broke down a certain fixed and established rule of property and general business dealing, for Coke says "certainty is the mother of quiet repose." [*1 Co. L.* (*B. & H.'s notes,*) *54 a.*] Judges do not lose their humanity by going on the bench, and where the law does not say expressly night and chaos must come, they will not bring that (*1 Co. L., Sup., 97 b.; Ib., 66 a; note 1*), and fortunately no tribunal has bowed with more

grace in fitting acknowledgment of this rule than this court.

*United States* v. *Kirby, 7 Wall., 483;*
*The Slaughter House cases, 16 Ib., 77;*
*Carlisle* v. *The United States, Ib., 153;*
*Chew Heong* v. *The United States, 112 U. S., 555.*

And this is an instance where the settled interpretation is suddenly, and without warning reversed, and that, too, by a divided court.

A change in the opinion of *one* justice would have affirmed the judgment below.

Surely it is right for your petitioner, mindful of the many people interested who can not come before the court, to urge upon the considerate attention of the majority of the justices, the fact that this unlooked-for result is fraught with disaster and almost ruin to numerous persons of small means.

The harm, your petitioner can not too earnestly remind the court, is not done alone to the holder of the bond. The baneful effect of the doctrine now announced is to be seen in a disposition on the part of sundry communities to enter upon a course of repudiation where hitherto no such thought could have found a lodgement. The intelligence that the Supreme Court of the United States has changed front on this vitally important question will foment discontent, and strengthen the hands of those who, from base motives, would encourage the people to evade paying their honest debts.

## III.

**It reverses the long-settled law of the land in respect to Negotiable Municipal Bonds.**

This effect is plainly admitted and avowed in the opinion of Mr. Justice Blatchford, speaking for the court.

It is, of course, for every court in its wisdom to determine when the hour has come to declare that what it has hitherto pronounced a sound principle of law shall no longer be regarded as such; or, in other words, that its earlier decision was wrong. It is to be admitted that Judge B is not bound to imitate the errors of Judge A, because Judge A chanced to live and blunder a hundred years ago, and that precedents should be followed either upon sincere conviction, or upon legal compulsion, not upon the conventional ground of professional etiquette; but it must likewise be conceded that in reviewing doctrine long engrafted and concreted into the very body of jurisprudence, this power to reverse and overthrow must be exercised sparingly and with the utmost caution. No one will for a moment dispute this. And the party who, shaping his conduct in full reliance upon the stability of the law as laid down by the highest tribunal of the land, and reaffirmed after exhaustive argument, has entrusted his property to another, confident of the law's protection, may feel justified in appealing to the court not to depart from the settled doctrine except for urgent reasons, whose force, to be felt, need only to be plainly stated. Nor does it detract from the dignity and authority of the court publicly to declare that in cases of this nature, upon attention being specially called to the far-reaching effect of its decision, the cause of justice will best be subserved by taking the subject-matter anew under consideration, that the departure contemplated may have the sanction, at least, of the most thorough examination and review that the court can give to it. An ideal standard is not attainable, but a fixed and certain one is, and that is all the affairs of men need. With interest and profit the words of *Kent* on this point might be read (*1 Kent, 476*, Holmes' 13th ed.), and the language of Sir *William Jones* (Blmt, 46) might not be out of place here.

Another distinguished author has said: "The greatest degree of confidence is not an infallible criterion of the greatest degree of accuracy; and in practice, I have commonly found the greatest readiness in admitting a revisal of their opinion in those who were possessed of the greatest rectitude of judgment, and I may add, that I have seldom seen that facility abused by improper applications." In this court, for example, out of the four or five hundred cases that are disposed of each term, the court is not asked for a rehearing probably in more than fifteen or twenty, and it would answer no useful purpose to state here the fate of these applications.

## IV.

**It announces the doctrine that a power in express terms in a municipal charter "to borrow money" does not authorize the corporation to issue negotiable bonds as a means of carrying that power into effect—a doctrine that is unsound in principle.**

The real question is, what did the Legislature of Texas mean by giving to the city of Brenham the power to borrow money? Here is the legislation on the subject material in this inquiry:

On the 4th of February, 1873, an act was passed by the Legislature of Texas (*Special Laws of Texas of* 1873, *ch.* 2, *p.* 2), incorporating the city of Brenham. By article 3, § 2, of that act (*p.* 14) it is provided as follows: "Sec. 2. That the city council shall have the power and authority to borrow for general purposes not exceeding ($15,000) fifteen thousand dollars on the credit of said city;" also, by article 7, § 1 (*p.* 23) as follows: "Sec. 1. Bonds of the corporation of the city of Brenham shall not be subject to tax under this act." This act was and is a public general act as distinguished from a private act. (Art. 24, sec. 1, charter Brenham, Spl. Laws, 1873.)

We are not to determine what may that term signify

to-day, but what did it mean when the city of Brenham took its charter?

Can there exist a doubt as to what the term "borrow money" meant when used by that Legislature? Was not the business community everywhere aware of just what that term signified? The city of Brenham took from the Legislature a charter containing these words in express terms, and is it open to question what the settled meaning of those words was at that date?

The precise inquiry, therefore, is, what power had the city upon accepting its charter?

The term had a settled meaning then. It meant to obtain money in the way that such borrowers usually obtain it, viz., by giving a promise to pay, of a negotiable nature. Whatever may be the opinion of judges to-day upon the meaning of the term as a question raised now for the first time, there is but one interpretation to be given to the term as used by the Legislature of Texas in the Brenham charter.

The import of the term as then used must be gathered from the state of the law as it then stood. That the court may be of opinion that for future cases it is wrong to attach this meaning to the term, is no sound reason for saying that the charter did not bear that meaning when it was granted.

In the construction of statutes, the circumstances of the times, the then-existing conditions, the interpretation placed by the courts of the State upon the use of the words, and the acts of the people themselves, must all be considered. These are elementary principles well and thoroughly discussed and applied in *Cooley Con. Lim., ch. 4*, where many authorities are cited and commented upon; and see *Douglass* v. *Pike County, 101 U. S., 677; Green Co.* v. *Conness, 109 Ib., 104; Rich.* v. *Mentz, 134 Ib., 632.*

As before said, the Legislature of Texas, in 1873, by a

special law, art. 3, sec. 2, charter of the city of Brenham, provided: That the city council shall have the power and authority to borrow, for general purposes, not exceeding fifteen thousand dollars ($15,000), on the credit of said city.

Aid the interpretation of this provision by the decisions of the Supreme Court of the United States, and solve the doubt, if any, as to what the Legislature intended by the grant of this power, and it must follow that *the express authority* given the city of Brenham to borrow money on the credit of the city, carried with it the authority to issue its bonds. To have supplemented the authority to borrow money with the authority to issue bonds as evidence of such borrowing, would, in 1873, have been words of supererogation, for such authority existed then under the decisions of the Supreme Court of the United States, without being expressly conferred, and the right to issue bonds necessarily followed the express authority to borrow money.

The true question at issue in the Brenham case is: What did the Legislature of Texas intend by the grant of authority to the city of Brenham to borrow money on the credit of the city? Every circumstance should be considered to assist in arriving at a correct conclusion as to the intention of the granting power.

Following the grant of power to create the debt, art. 7, sec. 1, Brenham charter special laws of 1873, provided: "*Bonds of the corporation of Brenham shall not be subject to tax under this act.*" Then follows art. 8 of the charter of Brenham, special laws, 1873, defining the duties of the city clerk, which provides: "*He shall also keep a register of the bonds and bills issued by the city* * *" These provisions of the charter of Brenham go to show that the Legislature had in mind the rules of law then existing, to the effect that the power to borrow money carried with it the authority to issue bonds. This view

of the intention of the Legislature is unanswerable, for why otherwise would it be made the duty of the city clerk to keep a register of the bonds of the city of Brenham, and why otherwise would the bonds of the corporation of Brenham have been exempted from city taxation? The majority of the court say that they do not know what these provisions mean, but they certainly are a recognition of the right to issue bonds, otherwise they would be without any meaning, and this view can not be indulged in.

The general powers of the city of Brenham are set forth in its charter. Among other things it had the authority to construct water works, city hall, buy cemetery grounds, etc. The taxable values of the city of Brenham and the other sources of revenue were entirely too small to enable the city to realize a sum sufficient from its annual taxing power to make these improvements, and they could only be made with money realized from the sale of its bonds to run through a series of years, and to be discharged gradually out of the money realized from taxation. To enable the city to borrow money and make these improvements, was unquestionably the purpose of the Legislature in granting it the *power to borrow money on the credit of the city.*

Were it true, that the Legislature intended that the city of Brenham should borrow money only for the ordinary expenses of its government, such as the payment of its police, the cleaning of its streets, etc., to be evidenced by scrip or like non-negotiable paper, it would have been absolutely useless for the Legislature to have conferred such authority, for this was an inherent right of the corporation and existed without any express authority from the granting power.

Another view: the record discloses the fact, that the city of Brenham had a small population and very limited resources. The power to borrow $15,000 to be discharged

out of the current revenues is inconsistent with the condition of Brenham's financial ability, and it is so largely in excess of its annual revenues, as to repel the idea that it was the intention of the Legislature that the city of Brenham could borrow $15,000 to be paid back only out of the annual revenues. Then what *was* intended by this grant of power? The authority to issue bonds to be discharged through a series of years. The authority means nothing unless it authorizes the issuance of bonds, for to do anything else was an impossibility in the condition of Brenham's finances. The court should consider these circumstances in arriving at the intention of the Legislature.

Then, too, the interpretation placed on this clause of the charter by the action of the city council of Brenham soon after its grant, should also be considered in ascertaining its meaning.

Under this authority, soon after its grant, the city of Brenham issued bonds, some of which were retired with the proceeds of the bonds involved in this case. An ordinance was passed (No. 27) providing the manner in which the bonds isued by the city should be signed. In issuing these bonds the city authorities again interpreted this clause of the charter and exercised the right to issue bonds. In the financial statement found in the record the right to issue bonds is again recognized. We do not maintain that the recognition of these bonds by the city authorities, or that the issuance of them or of other bonds is at all conclusive of the question of the authority to issue, but we refer to them to show the interpretation placed by the people themselves upon their power to borrow money, and to show their understanding of the intention of the Legislature.

We think that the case of *Dwyer* v. *Hackworth, 57 Texas, 245*, is authority here, and that it sustains the proposition that the city of Brenham could borrow money

upon the credit of the city, and did so exercise its right by the issuance of its bonds. If the city of Brenham had no authority under any circumstances to issue bonds, then the Supreme Court of Texas could not have sustained a tax to pay the interest on these bonds.

The power to issue the bonds is necessarily held by this decision of the Supreme Court of Texas to have existed under the charter of Brenham. Whether the power was rightfully exercised, whether the bonds were issued for a lawful purpose, could not be determined unless the holders of the bonds were before the court, and this only is what the Supreme Court of Texas say. To sustain a tax to pay bonds that the city of Brenham had no authority under any circumstances to issue, and that were absolute nullities, because of the want of any authority to issue them, would make the Supreme Court of Texas do a thing that would be without a parallel in judicial history. It may be claimed that the Texas decision is not good law, but the position that the question as to the power to issue the bonds was not necessarily involved in this case, and not decided by it, is scarcely tenable.

It may be said in the *Hackworth case*, that there was an agreed statement of facts, and that the power to issue the bonds did not come before the court, to which the reply is, that the charter of Brenham, by the act itself, is made a general law of which all courts must take judicial notice, and that consent of counsel can not engraft on the charter the power to issue bonds, and for the power to issue the court must look to the charter, and ascertain its intention from the rules already referred to, and that it is presumed the court did this.

But outside of the contemporaneous construction, it is insisted with the greatest confidence and with due respect, the proposition goes farther, and affirms that the term to *borrow money* necessarily implies the power and the right to issue a negotiable security in token of future repayment of the money borrowed.

Art. I, sec. 8, of the Constitution empowers the Congress "to borrow money on the credit of the United States."

Nobody was ever heard to question the power of Congress to issue negotiable bonds of the United States as a means of borrowing money. This power is not one thing in the Constitution and another thing in the charter of a city, so far as the means of effectuating the right to borrow is concerned. As to the *purposes* for which money can be borrowed, of course an entirely different rule of construction applies.

Whether it be a private person, a city, or a nation the power to borrow money means to obtain money in the method in use in the business community. A municipal corporation is very properly restricted in the sphere of its operations as to the *purposes* for which it may borrow, but the *means* it may adopt, to enjoy an undisputed right to borrow for a lawful purpose, are precisely what the laws of business prescribe in the case of borrowers genally.

The majority of the court, it appears, take the ground that the Legislature of Texas supposed they were granting, and the city of Brenham was receiving the power to issue a voucher non-negotiable, to parties who would lend money to the city, and that this was the extent of the power.

If this be so, what meaning can possibly be attached to the provision in this very charter that "bonds of the corporation of the city shall not be subject to tax under this act?" and the provision of the charter of Brenham that a register of the *bonds* and bills issued by the city should be kept?

It is respectfully suggested that the dangers and the evils alluded to in this opinion, to a large extent, grow out of a loose construction of what is to be regarded as public purposes. In like manner it is to be said that the fears expressed in the opinion in *Merrill* v. *Monticello*,

138 U. S., 673, are properly to be referred to a loose construction which implies a power to borrow where it does not exist, rather than to an undue extension of the meaning of the words "to borrow money."

No serious trouble seems to have come upon the court in its construction of this power during many years, until the decision in the case of *Merrill* v. *Monticello*, just alluded to. It is a sorrowful sight to witness this case impaled on the Merrill-Monticello case, in which the power to issue as claimed is as unlike the one here asserted, as powers touching any one general subject can be, and in which even the power claimed is from an implication upon an implication. The remotest similarity between them is discovered in one sentence of the court in the opinion in that case, which, it is submitted with the greatest kindness, was not necessary to the decision of the case, viz.:

"To borrow money, and to give a bond or obligation therefor which may circulate in the market as a negotiable security, freed from any equities that may be set up by the maker of it, are, in their nature and in their legal effect, essentially different transactions."

No man this side of Mount Atlas will deny this proposition, general and refined as it is, but it is most respectfully submitted, it is a species of refined generality that is unfavorable to correctness of judgment.

Let us get back a little to some general principles and then come by degrees to this particular power in dispute. It may be truthfully said, a general power consists of the particular powers that are essential to its execution, into which it may be analytically resolved, and that are consequently denoted ~~where~~ when it (the general power) is named. The power here contended for, *to borrow*, is expressly given. To borrow money! How, the precise mode is not stated, but of course whatever is necessary to execute that power is given—is contained in the

general power to borrow, and this thing necessary to its execution is denoted in the very naming of the power to borrow. Powers must be construed with a view to their enforcement, their execution, and not their defeat or evasion. No one could believe Brenham could have raised a dollar without some sort of security. What security? That is left to the borrower's discretion, in order to raise the money to do the work she was empowered to do. We are told she could have given a voucher, certificate, or something of the sort. How could she? The law does not say so, and the court is engaged in strict construction here. This power as to giving authority to issue a voucher or certificate is interpolated by the court; then if that be so, we ask why can not *bonds negotiable* be interpolated, too? Mind, now, in this matter we are legislating, for the law is silent as to the method of borrowing; then legislate in *bonds negotiable* also. No; the truth is, this power was left as it is, that the city might, within the usual course of business—commercial usuages — raise the money. Any other construction adopts a condition that nullifies the grant of power if insisted upon; but the other and better rule should prevail, that when a condition is imposed that destroys the grant expressly given, the grant stands, and the condition is void. We can not place the Legislature in the position of offering food to the city with one hand and withdrawing it before taken, with the other hand.

How much money could have been raised by the city on a voucher, certificate, or any non-negotiable paper? Not enough to pay the costs of the clerk of this court in this case. A mortgage upon a flock of black-birds in an Illinois prairie would have been as available. The very thing that made the borrowing possible was the negotiability of the paper given for its payment; but it is this negotiability that arouses the judicial ire, if not the "mortal antipathy," of the court. But this negotiability is what

was then in practice and is now in such transactions. It afforded investment for money which is said to be timid; and to this very custom and usage, with whatever abuses may have attended it, the country is more indebted than to anything else for its great material progress. We must not confound, which is a common error, any abuse, any perversion of this power with its use. This would uproot all things within human reach, possession, and enjoyment; sunlight, air, and life itself must all go, under the force of this reason drawn from abuse.

Then the common sense of the matter is, that two essentially different things in themselves were embodied in this grant of power and made one—to borrow money and to issue negotiable bonds for its payment; and the common sense of the transaction is probably the safest guide. But a short time ago, comparatively speaking, an anonymous author, in blazing and savage rhetoric, denounced one of the greatest judges in England for deciding cases upon principles of common sense; but the admirable code of mercantile, commercial law constructed by Mansfield has lived and grown to be the admiration of all people most. This idea of negotiability of paper for payment of money was and is one of its leading features, and in England and in this country it has been steadily and steadfastly adhered to, but right here it receives a severe and stunning shock.

In the briefs on file for the defendant in error, the leading cases and authors are cited, and we respectfully ask the court to re-examine them. We will crave leave, however, to refer to a few others, possibly cited but not commented on particularly at the submission or resubmission of the case.

In *Shoemaker* v. *Goshen Township* (14 O. S., 569), a case elaborately argued, and in which there was a lengthy opinion, it was held the grant of power to borrow money for the purpose of paying the amount subscribed, carried

with it the necessary incidental power of executing and delivering such evidences of indebtedness, as are sanctioned by the known usages of business in such cases; and it was, therefore, competent for the trustees to issue the *negotiable bonds* of the township, etc. The language of the court (page 584) fits this case precisely; and see cases there cited.

This, with the countless cases to the same effect in the books, is sustained in the case of *Williamsport* v. *Commonwealth* (84 Pa. St., 487). Indeed, it is impossible to turn to a book where the subject is discussed, reported cases or commentaries, that this question as here claimed for defendant is not determined in all its force and significance.

But both parties and the opinion and dissenting opinion cite and rely upon the excellent work of Judge Dillon on Municipal Corporations—a most worthy and competent authority. All Christian creeds claim to be founded and to rest upon the Bible, however differing and conflicting they may be. This is sometimes accounted for because of mistranslation, misreading, misinterpretation, etc. Now, let us go to the words of the author himself, and to these words we will leave it, as we would not be unwilling to have the author himself decide the question. Discussing the question generally and in particular cases, and reviewing the authorities exhaustively and weighing them with level and steady scales, he sums it up thus:

"*Express power to borrow money*, perhaps, in all cases, but especially if conferred to effect objects for which large or unusual sums are required, as, for example, subscriptions to aid railways and other public improvements, will ordinarily be taken, if there be nothing in the legislation to negative the inference, to include the power (the same as if conferred upon a corporation organized for pecuniary profit) to issue negotiable paper with all the incidents of negotiability."

1 *Dill. Mun. Cor.*, § 125, *4th Ed.*

It would require a harder heart than we possess, to deny or grudge even, to our opponents the quantum of comfort that can be gathered from this authority, to which we all have appealed. And if this does not clinch and rivet the conclusion we insist upon, then it will be long and weary days before we ever cite a book in court, with any degree of hope or confidence.

There is in the opinion of the court a short notice of the time of redemption mentioned in the bonds, varying from the time named in the ordinance, but no great stress is laid upon it. In the briefs on file and in the argument, this question was discussed and authorities produced to show this was wholly immaterial—it was a mere mistake that touched not the power to issue, and as such, would not vitiate the bonds. It is a perfect illustration of the rule, the useless will not vitiate the useful and necessary. It is in keeping with powers given for a certain limit, and they are exercised beyond that limit, the exercise is upheld to the extent of the limit anyhow. (*Hitchcock* v. *Galveston, 96 U. S., 341, and cases cited.*) "Where a power created by a statute has been fully executed, and something not authorized by the statute has been added, but which is clearly distinguishable from the rightful execution—the execution of the power is good as far as authorized, and void only as to the excess." (*The Commissioners* v. *Nichols, 14, O. S., 260,* and this was cited with approbation in *Fosdick* v. *Village, Ib., 472–9.* See *Burrough's Pub., Secs. 318–19, note 1,* and especially *Singer Manf. Co.* v. *City, 22 Albany L. J., 517.*)

While there are several other questions presented by the record, those discussed above are all that were passed on by the court, and it is deemed a discussion of the others is entirely unnecessary.

## V.

**The decision visits with severity your petitioner, who, in perfect good faith, with prudence and care, invested the trust money of its depositors in what at the time of the transaction was universally regarded under the decisions of this court as a form of negotiable security of the safest and best character.**

In saying this your petitioner does not mean to be understood as contending, that a rehearing ought to be granted because it is a hardship to the defendant to lose the case. Your petitioner deems it a duty as trustee for its depositors to invite the attention of your Honors to the fact that by no possible precaution could your petitioner have had warning not to make this investment; that the result is a peculiar one, inasmuch as a settled rule of law is reversed by a divided court, and innocent parties made to suffer. This fact being brought to the court's attention is of cumulative force to induce the court to grant a reargument.

One word as to the order made in this case.

The case is returned to the court below with directions to dismiss the suit and to enter a general judgment for the city of Brenham. Should the court be still of the opinion these bonds are invalid, and their vitality, if there is any, should be destroyed utterly, the consideration at the bottom of them still lives, and the city is liable for the money she raised, notwithstanding the bonds are dead. (*Little Rock* v. *National Bank, 98 U. S., 308, and cases cited.*) The complaint in the suit had not the *common counts*, and was not broad enough to reach this point, and to recover the money received by the city.

Would not the order, if the decision upon the bonds is to stand, be more in accordance with justice, if it allowed the defendant in error to amend the complaint and sue

for this money had and received? Amendments are purely within the discretion of the court in furtherance of justice. The order cuts off the right to apply in the court below to amend, and therefore it is asked here. It can scarcely be said, it is just for the city to avoid her bonds and keep the money she has derived from them too. It would seem but just to modify the order, at all events, to this extent.

This case is now committed to the court, and patient consideration of it is most respectfully, but most earnestly, requested. If counsel had all the bonds named in this controversy, and they were valid beyond all doubt, they would not, in a professional sense, be overpaid for their work and labor done and the anxious attention bestowed upon this case, and that consideration has not figured and could not figure with them in thus bringing the matter again before the court. But there is a great principle at stake, which is comprehensive, reaching far and wide, that will live and come home to the bosoms and business of men long after counsel and court here and now are done with law books and law cases forever; and we hope this will, in some degree, be an excuse for our once more vexing the court with this subject.

Respectfully,

A. H. GARLAND and
H. J. MAY,
*For Petitioners.*

I certify that this petition is presented in good faith, and I believe it is based on meritorious grounds.

A. H. GARLAND.

April 25, 1892.

SEP 30
JAMES H. MCK
CL

# In Supreme Court of the United States,

OCTOBER TERM, 1891.

No. 120.

THE CITY OF BRENHAM, PLAINTIFF IN ERROR,

*vs.*

THE GERMAN-AMERICAN BANK, DEFENDANT IN ERROR.

*In Error to the Circuit Court of the United States for the Western District of Texas.*

BRIEF FOR PLAINTIFF IN ERROR.

S. R. FISHER,
Counsel for Plaintiff in Error.

Hutchings Printing House, Austin, Tex.

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BRIEF FOR PLAINTIFF IN ERROR.

## STATEMENT OF CASE.

This was an action by the German-American Bank of New York, against the city of Brenham, a municipal corporation of Texas, to recover on the following described interest-bearing coupons, attached to certain bonds issued by the city of Brenham, under an ordinance of said city, bearing date June 7, 1879:

(1.) Six coupons for $2.50 each, attached to bond number 1, for $50, making $15; (2.) Six coupons for $2.50 each, attached to each of the bonds, numbered 2 to 30 inclusive, (29 bonds) for $50 each, making 174 coupons, aggregating $435; (3.) Five coupons for $2.50 each, attached to each of the bonds, numbered 31 to 50 inclusive (20 bonds), for $50 each, making 100 coupons at $2.50 each, aggregating $250; (4.) Five coupons for $5.00 each, attached to each of the bonds, numbered 51 to 75 inclusive, (25 bonds) for $100 each, making 125 coupons at $5.00 each, aggregating $625; (5.) Six coupons for $25 each, attached to each of the bonds numbered 76 to 89 inclusive (14 bonds) for $500 each, making 84 coupons at $25 each, aggregating $2,100; and (6.) Five coupons for $50 each, attached to each of the bonds num-

bered 90 to 92 inclusive, (3 bonds) for $1,000 each, making 15 coupons at $50 each, aggregating $750.

Briefly stated, the plaintiff seeks to recover: *First*, on 280 coupons for $2.50 each, $700; *Second*, on 125 coupons for $5 each, $625; *Third*, on 84 coupons for $25 each, $2,100; and *Fourth*, on 15 coupons for $50 each, $750, making a total, exclusive of interest, of $4,175.

The plaintiff alleges, among other things: That the city of Brenham was authorized by its charter, granted in 1873, by Special act of the Legislature, to issue the bonds and the coupons annexed thereto; that, on the 31st day of July, 1879, under authority of an ordinance of said city passed on the 7th day of June, 1879, 92 bonds, with interest-bearing coupons attached, were issued by said city; that plaintiff was the legal owner and holder of said bonds, having purchased the same for value, in due course of trade, before maturity; that the city had lawful power and authority to issue the bonds and coupons; and that such power was conferred by its charter of incorporation. (Rec. 1-4; 11-15.)

The defendant interposed to the pleadings of plaintiff:

*First.*—A plea to the jurisdiction, on the ground that plaintiff is not the *bona fide* owner and holder of the bonds; but, on the contrary, that the transfer of the same to plaintiff by one Mensing was colorable only and for the purpose of conferring jurisdiction upon the court.

*Second.*—Demurrers, general and special, questioning the validity of the bonds and coupons; (Rec. 8, 15 and 16,) and

*Third.*—An answer alleging in substance:

That the city of Brenham is a municipal corporation, having a population of less than ten thousand inhabitants, incorporated on the 4th day of February, 1873, under the constitution and laws of Texas, with powers and privileges limited and restricted by the law of its immediate creation and the constitution of the State; that, as such corporation, it has no power now, and had none on the 7th day of June, 1879, to pass or enact resolutions, ordinances, or by-laws repugnant to the constitution and laws of said State, but all such resolutions, ordinances, and by-laws must conform thereto or otherwise be invalid and inoperative; that, under the

provisions of the State constitution, adopted in the year 1876, and prior to the passage of the ordinance of June 7th, 1879, in plaintiff's petition mentioned, cities and towns with a population of 10,000 inhabitants or less have authority to levy, assess, and collect *an annual tax in current money*, to defray *only* the current expenses of their local government, and are without power to borrow money and issue negotiable bonds therefor, and collect taxes for the payment of the same; and that, on said 7th day of June, 1879, no power existed in its city council to pass the ordinance of that date, and all bonds and interest-bearing coupons, which were issued in pursuance thereof, are without validity and constitute no legal and subsisting liability against it.

That the bonds specified in plaintiff's petition were signed by its mayor and secretary, but the names of the mayor and secretary were printed on the coupons; and that the ordinance, authorizing such printing of the signatures of the mayor and secretary, was illegal and void, and the bonds issued thereunder invalid.

That the ordinance aforesaid was further invalid and the bonds issued thereunder void, because the ordinance failed to provide for the payment of the interest on said bonds and to provide an adequate sinking fund for the payment of said bonds, as required by the constitution and laws of the State.

That the said ordinance was further invalid in that it authorizes the coupons attached to said bonds to be received in payment of taxes, in direct contravention of the constition and laws of the State.

That neither the mayor nor secretary, nor both of said officers, was authorized to execute the said bonds and coupons, and the same were issued without authority of law and in direct violation of the said ordinance of June 7th, 1879, for this, that said ordinance authorized the execution and issuance of fifteen thousand dollars of bonds, payable twenty years after the date thereof, redeemable, at the option of the defendant, at any time after *five* years from their date; that the supposed bonds, described in plaintiff's petition, can only be redeemed by defendant, according to to the recitals appearing upon their face, after the expira-

tion of *ten* years from the date thereof; and that the execution and issuance of said bonds were wholly unauthorized and the same are null and void.

That it is provided, in section 4, article 11, of the constitution of the State of Texas, that no county, city, or other municipal corporation shall become a subscriber to the capital stock of any private corporation or association, or make any appropriation or donation to the same, or in any wise loan its credit; that the prohibition therein contained denied the defendant the right to make an appropriation or donation to any railroad company or in any wise loan its credit in aid or for the benefit of any railroad corporation; but that, notwithstanding the constitutional restriction and inhibition above set forth, defendant's city council, on the said 7th day of June, 1879, passed the ordinance above referred to, to authorize the issuance of fifteeen thousand dollars of city bonds, redeemable after five years from date thereof, and said bonds were really and in fact issued in aid of the Gulf, Colorado & Santa Fe Railroad Company for the purchase of right of way over the streets of defendant and for the purchase of depot grounds in, and the construction of said road through, the said city of Brenham. That said bonds, so authorized to be issued for the railroad purposes aforesaid, were sold by defendant to the following named persons: Giddings & Giddings, $5,000; the said G. H. Mensing, $5,000, and to F. A. Engelke, $2,000; that, thereafter, the said Mensing became the owner and holder of the bonds, previously purchased by Giddings & Giddings and Engelke from defendant, and of the remaining $3,000 of the issue of fifteen thousand dollars, and is now the real owner and holder of the same. That said Giddings & Giddings, Mensing, and Engelke purchased said bonds with actual and personal knowledge of the unlawful purpose for which they were issued, as well as record notice of such illegal purpose as disclosed by the public records and minutes of defendant's city council; and that said bonds and interest-bearing coupons are null and void and constitute no legal charge against defendant.

That, if the plaintiff be the owner of said bonds and coupons, it purchased the said coupons after their maturity and

with knowledge of all the facts and circumstances attending the issuance of the same, well knowing that neither the said mayor nor secretary had authority, under the ordinance aforesaid, nor the defendant under the constitution and laws of the State, to issue the same, and with knowledge that they were issued to raise money for the purpose of enabling defendant to purchase the right of way and depot grounds for the said Gulf, Colorado & Santa Fe Railroad Company—an illegal purpose and one for which defendant was not authorized to issue negotiable bonds.

That said bonds are illegal and void because they do not specify the purpose for which they were issued; nor have they ever been registered with the Comptroller, as required by said ordinance and laws of the State.

That, at the date of the passage of said ordinance of June 7th, 1879, the current expenses of defendant, for ordinary municipal purposes, were more than sufficient to absorb the current revenues, derived from taxation within the constitutional limit, and there was no power in defendant to levy a tax to pay the interest and provide a sinking fund to meet the principal of said bonds; and hence said bonds are null and void.

That, prior to the time the bonds and coupons aforesaid were issued, defendant had issued five thousand dollars of bonds, for general purposes, which were outstanding at the time the bonds in suit were issued, and the bonds and coupons declared upon in this suit are void. (Rec., 8–11.)

Other supplemental pleadings, not material to be noticed in this connection, were filed by both parties. (Rec., 11–14; 15, 16.)

The case was heard on the original and supplemental petitions of plaintiff, on the amended original and supplemental answers of defendant, and on the evidence adduced at the trial, and resulted in a verdict and judgment thereon for plaintiff for $5,510.10. (Rec., 20, 21.)

The judgment of the court below, from which error was duly prosecuted, is here for revision upon the following

## ASSIGNMENTS OF ERROR.

*First.* The court erred, for the reasons stated in defendant's bills of exception, Nos. 1 and 2 (Rec., 21, 23), in overruling defendant's general demurrer and special exceptions to plaintiff's original and first supplemental petitions;

*Second.* The court erred in not admitting, for the purposes for which the same was offered, the testimony incorporated into defendant's bill of exceptions, No. 3 (Rec., 23–37), and in restricting and limiting its admission to the purposes therein stated;

*Third.* The court erred, for the reasons stated in defendant's bill of exceptions, No. 4 (Rec., 37–42), in admitting in evidence, over the objection of defendant, seasonably interposed, the evidence set out in said bill;

*Fourth.* The court erred in charging the jury as follows: "By way of further defense, the defendant contends that the city did not comply with that article of the constitution which provides that all cities before incurring a debt shall provide by ordinance for securing payment of the interest thereon and for a sinking fund to pay the principal, and therefore the plaintiff was charged with knowledge of their invalidity. The plaintiff relies on the following ordinance to show compliance with the requirements of the constitution: 'Sec. 7. That there be, and is hereby appropriated out of the general ad valorem tax of the city one-eighth of one per cent, or so much thereof as may be necessary, on the assessed value of the taxable property of the city, as a special interest and sinking fund with which to pay the interest on said bonds and liquidate the same; and said fund shall be kept separate from the other funds of the city and shall be used for no other purpose.' 'Sec. 8. That this ordinance go into effect and have force from and after its passage.' I charge you that the ordinance read to you, in connection with the other ordinances that I shall not read to you, shows a substantial and sufficient compliance with the law, and on this defense you will find for the plaintiff;" and in not giving in charge to the jury the following special instruction requested by the defendant: "If, from the evidence, the jury believe that, at the date of the issuance of

the coupons in suit and the bonds to which they were attached, the assessable property of the city of Brenham was not sufficient in amount to enable the city, by the imposition of lawful taxes, to raise revenue sufficient to provide for its current expenses, and to further provide for the payment of interest on the bonds and for providing a sinking fund of at least two per cent to pay the bonds at maturity, then you are charged that the city had no power to issue the coupons in suit and the bonds to which they were attached, and in this event you will find for the defendant." (Bill of Ex., No. 5, Rec., 43.)

*Fifth.* The court erred in charging the jury as follows: "Bonds to the amount of $15,000, with interest coupons attached, were issued in 1879 by the defendant city, then operating under the charter of 1873. In that charter section 2 says: 'That the city council shall have power and authority to borrow money, for general purposes, not exceeding $15,000, on the credit of the city.' The constitution of the State, 1876, allows such cities as Brenham to collect an annual tax to defray the expenses of their local government, not to exceed for any year one-fourth of one per cent. The power in the city to borrow money carries with it the authority to issue bonds in this case. And it may be that the limitation of the power to tax beyond one-fourth of one per cent impairs the ability of the defendant to pay the bonds and coupons, but I do not think it denies the capacity of the corporation in 1879 to issue the bonds as commercial paper,"—Because: (1) Under the constitution of Texas, the expense of carrying out the general governmental purposes of the defendant city is to be defrayed by the levying and collection of a tax and not by the issuance of negotiable bonds to be sold in open market; and (2) The bonds so issued by the defendant, are not clothed with the incidents of commercial paper. (Bill of Ex., No. 7, Rec., 46.)

*Sixth.* The court erred in charging the jury, in substance, as follows: That the ordinance under which the bonds were issued disclosed that they were to be issued and sold for a lawful purpose, and the bonds issued thereunder and purchased by Mensing recited a lawful purpose and are valid bonds, unless the jury believe that they were actually

issued and sold for an unlawful purpose, and that Mensing knew or had knowledge of the unlawful purpose for which they were issued at the time he purchased them; and that the city having substantially made, by the ordinance, provisions for the interest and sinking fund, the fact that there was an insufficient amount provided by the ordinance would not invalidate the bonds. (Bill Ex., No. 6, Rec., 44.)

*Seventh.* The court erred in not giving in charge to the jury the following special instructions asked by the defendant: "If from the evidence the jury believe that, at the date of the issuance of the bonds to which the coupons in suit were attached, the current expenses of the city of Brenham were equal to or in excess of the annual revenue accruing to it by taxation, then you are instructed that the issuance of said bonds was illegal and void, and you will return a verdict for the defendant." (Special instruction, No. 3, Bill Ex., No. 6, Rec., 45); [redacted], "If from the evidence the jury believe that, at the time the plaintiff acquired the coupons upon which this suit is brought, some of the coupons were past due, then you are instructed that the defendant may avail itself against plaintiff of any equities or defenses which would defeat a recovery thereon; and, in this connection, you are further instructed that, if from the evidence you believe the bonds with the coupons attached were, in fact, issued for the purpose of extending aid to the Gulf, Colorado & Santa Fe Railroad Company by purchasing and donating to it the right of way and depot grounds through and in the city of Brenham, or if you believe from the evidence that the bonds to which the coupons in suit were attached were sold and the proceeds used in the purchase of right of way and depot grounds for said railroad company, then you will, as to such of the coupons as were past due at the time plaintiff acquired same, find for the defendant." (Special instruction No. 1, Bill of Ex., No. 6, Rec., 45.); and,

"If from the evidence the jury believe that, prior to acquisition by plaintiff from Mensing of the bonds and coupons testified to by J. H. Mensing and by the president and cashier of the plaintiff bank, Mensing, prior to or at the time of his purchase or purchases, knew, or was in possession of facts from which he might have known, that the

bonds were really issued in aid of the G. C. & S. F. R. R. Co., and for its benefit, or that the proceeds of the sale of said bonds were appropriated by the city to the purchase of depot grounds and right of way for said R. R. Co., and Mensing, with such knowledge or means of knowledge, bought said bonds and subsequently transferred part of same to plaintiff for value, with overdue coupons attached, then you are instructed that as to all of the coupons attached to the bonds on which were the overdue coupons and as to the overdue coupons themselves the plaintiff is charged with notice of their invalidity and cannot recover." (Special Instruction No. 2, Bill of Ex. No. 6, Rec. 45.)

These assignments may be thus summarized:

The court erred in not sustaining defendant's demurrers, and in not directing a verdict for the defendant, because it affirmatively appears, not only from the pleadings and from the constitution and laws of Texas, but also from the testimony incorporated into defendant's bill of exceptions No. 3, (Rec. 23-37,) that the defendant city was without authority whatever to issue the bonds to which the coupons in suit were attached, and that the same were and are absolutely void for all purposes, and in the hands of all persons, no matter when or under what circumstances acquired.

As is apparent, the principal and controlling question here for decision is:

Had the city of Brenham, when it passed the ordinance of June 7, 1879, and when it sold the bonds therein authorized, the *power* to authorize the execution and sale, in open market, of ten per cent coupon bonds, negotiable and payable twenty years from date?

As the exceptions saved, (indicated in the assignments of error, *supra,*)—whether taken to the rulings of the court on demurrer to pleadings, or to the charge given, or charges refused—all present the same issue, viz: power in in the city of Brenham, when it sought to exercise it, to authorize, issue and sell negotiable time securities, the question will be considered:

*First,* With reference to the charter of 1873, considered

apart from the provisions of the constitution of 1876 relating to municipal corporations; and,

*Second*, With reference to the effect the said constitution had upon the power claimed under the charter.

## I.

Without reference to the prohibitions, restrictions or limitations imposed by the constitution of Texas upon the debt-creating and taxing powers of municipal corporations, the charter granted to the city of Brenham in 1873, and under which it was operating in 1879, conferred no power, express or implied, to issue negotiable interest-bearing bonds of the character issued and sold by it in 1879.

The city of Brenham was incorporated by an Act of the Legislature of the State of Texas, approved Feb. 4, 1873; and, at the date of its incorporation and on the 7th day of June, 1879, had a population of less than ten thousand inhabitants. (Rec., 16, 23.)

The city now acts and since 1873 has acted under the special charter just referred to, which contains the following provision under which alone the power to issue the bonds sought to be authorized by the ordinance of June 7th, is claimed:

"Sec. 2. That the city council shall have the power and authority to borrow, for general purposes, not exceeding $15,000, on the credit of said city." (Sec. 2, Art. 24, Charter; Special Laws 1873, page 14.)

The ordinance referred to reads thus:

"*An ordinance to provide for the issue and sale of fifteen thousand dollars in coupon bonds of the city to borrow money for general purposes.*

"Be it ordained by the city council of the city of Brenham:

"Section 1. That the mayor be, and is hereby authorized and empowered to have printed coupon bonds of the city of Brenham to the amount of fifteen thousand dollars.

"Sec. 2. Said bonds shall be three (3) of the denomination of one thousand ($1,000) dollars, fourteen (14) of the

denomination of five hundred ($500) dollars, twenty-five (25) of the denomination of one hundred ($100) dollars, and fifty of the denomination of fifty ($50) dollars.

"They shall be made payable to bearer twenty years after date, at the office of the treasurer of the city of Brenham, with interest from date until paid, at the rate of ten per cent per annum, payable semi-annually on the first days of September and March, at the office of the treasurer of the city of Brenham, but the city shall have the right to redeem said bonds at any time after five years from date.

"Sec. 3. Said bonds shall be dated, and interest begin to run on the first days of ——— A. D., 18—. Provided that should any of said bonds be sold at a subsequent date, the amount of interest then due shall be endorsed as a credit on the coupons first due.

"Sec. 4. Said bonds shall be signed by the mayor and countersigned by the city clerk, and the seal of the city shall be affixed, and they shall be numbered and registered as series 2, No. —, giving the number of the bond issued, commencing with No. 1.

"Sec. 5. Coupons shall be attached to each of said, bonds for each semi-annual installment of interest, which said coupons shall have printed thereto the signature of the mayor and of the city clerk, and shall be received for general ad valorem taxes of the city.

"Sec. 6. Said bonds shall be negotiated and sold by the Mayor and Finance Committee of the city, as the same may be required for general purposes, but in no case shall they be sold at a greater discount than five per cent and the proceeds thereof shall be placed in the treasury of the city to the credit of the general fund.

"Sec. 7. That there be and is hereby appropriated out of the general ad valorem tax of the city one-eighth of one per cent, or so much thereof as may be necessary, on the assessed value of the taxable property of the city, as a special interest and sinking fund, with which to pay the interest on said bonds and liquidate the same; and said fund shall be kept separate from the other funds of the city, and shall be used for no other purpose.

"Sec. 8 That this ordinance go into effect and have force from and after its passage.

"Approved June 7, 1879.

"M. P. KERR, Mayor.

"Attest:

"C. H. CARLISLE, Secretary."

The bonds issued and sold are alike, except as to amount, and read as follows:

"UNITED STATES OF AMERICA.

"STATE OF TEXAS. CITY OF BRENHAM.

"CITY OF BRENHAM BONDS.

"No..... $100.

"Bonds for General Purposes, $15,000.

"Twenty years after date, for value received, the City of Brenham promises to pay to Bearer One Hundred Dollars, with interest at the rate of Ten per cent per annum from date, payable semi-annually on the first days of September and March of each year upon presentation of the proper coupon hereto annexed, both Principal and Interest payable at the office of the Treasurer of the City of Brenham.

"This Bond is redeemable by the City of Brenham after the expiration of Ten years from date hereof. This Bond is authorized by an ordinance of the City of Brenham, approved June 7, A. D. 1879.

"IN WITNESS WHEREOF, the Mayor and Secretary of the City of Brenham hereunto set their hands and affix the seal of the City of Brenham, this the ——day of——A. D. 1879.

".....Mayor.

".....City Secretary."

The coupons follow the same form, and read thus:

"The City of Brenham will pay to bearer Five Dollars for six months interest, due March 1st, 1880, at the office of the City Treasurer, on bond No.....

"M. P. KERR, Mayor.

"C. H. CARLISLE, City Secretary."

The bonds were sold and bought by various parties,

among whom was one G. H. Mensing, who, subsequently, became the holder and owner of the entire issue. Mensing transferred the greater part of same to plaintiff, as collateral security for moneys advanced and to be advanced to the firm of Mensing Brothers & Company, of which he was a member.

The interest upon the bonds was paid until March, 1883, the last payment of interest being of coupons which matured in September, 1882; after that time payment was declined.

In order to determine the existence or non-existence of the power to issue the bonds in controversy, recourse must be had to the charter, or act of incorporation, as the power, if it exist at all, is claimed to spring, solely, from Section 2, of Article 24, of the charter. (Special Laws of 1873, page 14, *supra* .)

The grant, in said section, is of "power and authority *to borrow, for general purposes*, not exceeding $15,000 upon the credit of the city." What, then, is the proper construction, the true meaning, of this charter provision—that is, what may the city do thereunder, and how, and in what manner must it be done? If empowered by this provision to borrow the amount authorized, ($15,000) at one time, in one sum, or at different times in different sums, then, after having once reached the limit, may the power be again exercised, or does it thereafter become inoperative?

The power "*to borrow*" is by the charter limited and restricted to "general purposes," and cannot be exercised in furtherance of any purpose that does not fall within such classification. The *general purposes* of a municipal corporation include *local government and police* and are carried out through the exercise of the taxing power, (Mayor v. Ray, 19 Wall., 475, 476) and not by the issuance of negotiable bonds, clothed with all the attributes of commercial paper. It is, therefore, reasonable, in the effort to ascertain the legislative intent, to conclude that the legislature, in conferring upon the city of Brenham the power *to borrow money*, "*for general purposes*," up to a specified limit, intended to invest the city with the right to exercise the power once for all—either by borrowing the entire amount

at one time, or at different times—and to execute, as a voucher for money received from a lender, or in payment of a creditor to whom it had become indebted, the usual evidence of indebtedness in the shape of non-negotiable paper, for its re-payment. This, up to the limit within which the power might be exercised, would be a *borrowing* within the terms of the power. To execute or carry out such a power no necessity whatever would exist, and hence none should be implied, for the execution and sale, in open market, at a discount, of negotiable, interest-bearing time bonds, unimpeacable in the hands of a *bona fide* holder. Such an implication is never to be indulged, *except where it is necessary to give effect to an express power which otherwise would be nugatory.* (Cooley on Con. Lim., 235 and note; Cleburne v. Railway Co., 66 Texas, 461; 138 U. S., 687.)

Under the charter provision, the power to borrow money, for the purposes specified, could have been readily exercised in the usual modes; and the issuance and sale of negotiable, interest-bearing time bonds, to circulate as commercial paper, was in no sense essential to its enjoyment.

Charters of municipal corporations are to be tested, as to their powers and the manner of their exercise, *by the rule of strict construction;* and, while the construction is to be just, seeking first for the legislative intent, yet an ambiguity or doubt as to the existence or extent of the asserted power is always to be resolved against the corporation.

Says Mr. Dillon, in treating of the powers of municipal corporations:

"It is a general and undisputed proposition of law that *a municipal corporation possesses and can exercise the following powers, and no others:* First, those granted in *express words*; second, those *necessarily or fairly implied* in or *incident* to the powers expressly granted; third, those *essential* to the declared objects and purposes of the corporation—not simply convenient, but indispensable. Any fair, reasonable doubt concerning the existence of power is resolved by the courts against the corporation, and the power is denied. Of every municipal corporation the charter or statute by which it is created is its organic act. Neither the corporation nor its officers can do any act, or

make any contract, or incur any liability, not authorized thereby, or by some legislative act applicable thereto. All acts beyond the scope of the powers granted are void. Much less can any power be exercised, or any act done, which is forbidden by charter or statute. These principles are of transcendent importance, and lie at the foundation of the law of municipal corporations." (1 Dill. on Mun. Corp , 4th Ed., Sec. 89 and notes; Williams v. Davidson, 43 Texas, 33, 34; 57 Texas, 542; Merrill v. Monticello, 138 U. S., 681.)

"The *extent of the powers of municipalities*, whether express, implied, or indispensable, is one of construction. And here the fundamental and universal rule, which is as reasonable as it is necessary, is that, while the construction is to be just, seeking first of all for the legislative intent in order to give it fair effect, yet any ambiguity or doubt as to the extent of the power is to be determined in favor of the State or general public, and against the State's grantee. The rule of strict construction of corporate powers is not so directly applicable to the ordinary clauses in the charter or incorporating acts of municipalities as it is to the charters of private corporations; but is equally applicable *to grants of powers to municipal and public bodies which are out of the usual range*, or which *may result in public burdens*, or which, in their exercise, touch the right to liberty or property or, as it may be compendiously expressed, any common-law right of the citizen or inhabitant." (1 Dill. on Mun. Corp., 4th ed., sec. 91, and cases collected in note 2, p. 148.)

Invoking this rule, in the consideration of the provision in question, it is submitted: (1) That the city of Brenham had power thereunder to borrow, *in the ordinary and usual way*, for the general purposes of its local government, up to the limit fixed, and to execute and deliver the usual evidences of indebtedness; (2.) That, if at the time the city sought to exercise its borrowing power, the amount attempted to be borrowed, in connection with amounts, if any, previously borrowed, would carry the total amount beyond the $15,000 limit, the power could not be exercised; (3) That, after having exercised the power *once*, to the limit

named, the power would be exhausted and could not thereafter be invoked; and (4) That, the issuance of negotiable securities, such as are in controversy here, was not in *express* terms authorized, *and, not being essential to the exercise of the power to borrow for general purposes,* cannot be implied.

Power to borrow money for *general purposes* can never, it is thought, carry with it, as an incident, the power to issue and float, in open market, negotiable securities to run, with interest coupons, through a series of years. The power *to borrow* is not the legal equivalent of the power *to issue bonds;* and it is suggested that, while the power to issue bonds has sometimes, *in the absence of statutory or constitutional restrictions or prohibitions,* been implied, from the existence of an express power to borrow money in order to effectuate or execute a special purpose not within the ordinary governmental or general purposes of the municipality, and which is usually accomplished with funds raised by the sale of bonds, such power can never be implied where the purposes for which the borrowing is authorized are, as here, restricted and confined to *general purposes.* In such case, as the ordinary governmental purposes—*the general purposes*—of the municipality are carried out with revenues derived from taxation within authorized limits, it is submitted that the presumption should be indulged that the Legislature, in granting the power to borrow money *for general purposes,* intended to confer upon the municipality, in the administration of its ordinary governmental affairs, the right, to the extent indicated, to borrow money, in anticipation of its tax revenue, by direct loan or by incurring indebtedness, for which, in either case, it might give the usual evidences of indebtedness to be paid out of revenues derived from taxation.[1] This construction does violence to no rule for the construction of municipal charters and gives full scope to the power conferred upon the city to borrow money.

In stating what he regards as the true doctrine, with respect to the *implied power* of a municipal or public corporation to issue commercial paper, Mr. Dillon observes: "* * * That *merely as incidental to the discharge of its ordinary corporate*

1. Bangor Sav. Bank v. City of Stillwater, 46 Fed. Rep. 899, 900

*functions*, no municipal or public corporation has the right to invest any instrument it may issue, whatever its form, with that supreme and dangerous attribute of commercial paper which insulates the holder for value from defences and equities which attach to its inception. This point ought to be guarded by the courts with the utmost vigilance and resolution." (1 Dill. on Mun. Corp., 4th ed., Sec. 126 and note 1.)

The same learned jurist and author, after stating the conflict in the authorities touching the *implied power* of municipalities to issue commercial securities, and denying the soundness of the argument by which the existence of such power is sought to be sustained, says:

"The whole argument is, in our judgment, unsound. It is true that in this country private business corporations are usually considered to have the incidental power to borrow money or give negotiable paper as an evidence of their indebtedness, but in England it is held that express power is necessary to enable even railway corporations to draw, endorse, or accept bills of exchange. But admit that the American doctrine is otherwise, and that it is rightly so, still there is no resemblance between private and public or municipal corporations in this regard. The latter are simply agencies of government. They are not organized for trading, commercial, or business purposes. They have, in general, but one mode of meeting their liabilities, and that is by taxation, and it is upon this resource that creditors must be taken to rely. For hundreds of years in England such corporations have existed, without it even being contended that they could, without express authority, issue commercial paper. Private corporations are much more vigilant and watchful of their interests than it is possible for public or municipal corporations to be. The frauds which unscrupulous officers will be enabled successfully to practice, if an implied and unguarded power to issue negotiable securities is recognized, and which the corporation or the citizen will be helpless to prevent, is a strong argument against the judicial establishment of any such power. And the argument is unanswerable, when it is remembered that, in ascertaining the extent of corporate

powers, there is no rule of safety but the rule of *strict* construction; and that such an implied power is not necessary, however convenient it may be at times, to enable the corporation to exercise its ordinary and usual express powers, or to carry into effect the purposes for which the corporation is created. (Ibid Sec. 507.)

"We regard as alike unsound and dangerous the doctrine that a public or municipal corporation possesses the *implied power* to borrow money for its ordinary purposes, and as *incidental* thereto the power to issue commercial securities, that is, paper which cuts off defences when it is in the hands of a holder for value acquired before it is due. The cases on this subject are conflicting, but the tendency is towards the view above presented. The opinion of Mr. Justice Bradley, in a case before referred to, (Mayor v. Ray, 19 Wall.) evinces a thorough comprehension of the whole question, and, in our judgment, is sound in every proposition it advances, and must become the law of this country. This view is confirmed by the almost invariable legislative practice in the States to confer, when it is deemed expedient, upon municipalities and public corporations, in *express* terms, the power to borrow money or to issue negotiable bonds or securities; and it is of instruments thus authorized that we now proceed to treat. It is an undisputed doctrine that the power of public and municipal corporations to subscribe to the stock of railway companies and to issue bonds therefor must be *expressly* conferred. The Supreme Court of the United States has repeatedly adjudged that the grant of power to a municipal corporation to appropriate moneys in aid of the construction of a railroad, where the power is accompanied with a provision directing the levying and collection of taxes to meet such appropriation, and prescribing no other mode of payment, gives no power, but excludes it, to issue negotiable bonds in payment of such appropriation." (Ibid, 507a.)

In *Merrill v. Monticello* this court, through Mr. Justice Lamar, in denying the power of municipal corporations, under a power to borrow money, to issue negotiable bonds and sell them in open market as commercial paper, says: "It is admitted that the power to borrow money, or to incur

indebtedness, carries with it the power to issue the usual evidences of indebtedness by the corporation to the lender or other creditor. Such evidences may be in the form of promisory notes, warrants and, perhaps, most generally, in that of a bond. But there is a marked legal difference between the power to give a note to a lender for the amount of money borrowed, or to a creditor for the amount due, and the power to issue for sale, in open market, a bond, as commercial security, with immunity, in the hands of a *bona fide* holder for value, from equitable defences. The plaintiff in error contends that there is no legal or substantial difference between the two; that the issuance and disposal of bonds in market, though in common parlance, and sometimes in legislative enactment, called a sale, is not so in fact; and that the so called purchaser who takes the bonds and advances his money for it is actually a lender, as much so as the person who takes the bonds payable to him in his own name.

"We think the case of *Police Jury v. Britton*, 15 Wall., 566, is directly and absolutely conclusive against the plaintiff in error on this point. It was an action upon coupons of certain bonds issued by the Police Jury of Tensas Parish, La., the validity of which the defendant denied, upon the ground that they were issued without the authority of any law of that State. It appeared that the Police Jury had no express authority to issue the bonds in question; and, if they had any authority of the kind, it must be implied from the general powers of administration with which the said Police Jury was invested. The question, therefore, directly presented in that case was precisely the question directly presented in this case, viz: whether the trustees or representative officers of a Parish, county or other local jurisdiction, invested with the usual powers of administration, in specific matters, and the power of levying taxes to defray the necessary expenditure of the jurisdiction, have an implied authority to issue negotiable securities, payable in future, of such character as to be unimpeachable in the hands of *bona fide* holders, for the purpose of raising money or funding a previous indebtedness.

"The opinion of the court, delivered by Mr. Justice Brad

ley, clearly illustrated the fundamental distinction between issuing bonds merely as evidences of a debt or loan and issuing bonds for negotiation and sale generally, with respect to the powers of a municipal corporation. It said: 'That a municipal corporation which is expressly authorized to make expenditures for certain purposes may, unless prohibited by law, make contracts for the accomplishment of the authorized purposes and thereby incur indebtedness, and issue proper vouchers therefor is not disputed. This is a necessary incident to the express power granted. But such contracts, as long as they remain executory, are always liable to any equitable consideration that may exist or arise between the parties and to any modification, abatement or rescission in whole or in part that may be just and proper in consequence of illegalities or disregard or betrayal of the public interests. Such contracts are very different from those which are in controversy in this case. The bonds and coupons on which a recovery is now sought are commercial instruments, payable at a future day and transferrable from hand to hand * * . The power to issue such paper has been the means, in several cases which have been brought to our notice, of imposing upon counties and other local jurisdictions burdens of a most fraudulent and iniquitous character, and of which they would have been summarily relieved had not the obligations been such as to protect them from question in the hands of *bona fide* holders * * * . It seems to us to be a power quite distinct from that of incurring indebtedness for improvements actually authorized and undertaken, the justice and validity of which may always be enquired into. It is a power which ought not to be implied from the mere authority to make improvements.'" (138 U. S., 687, 688, 689.)

In the case of *Police Jury v. Britton*, just referred to, the court, in the further progress of the opinion, in speaking of the care to be exercised in indulging implications of power, observed: "But in our judgment these implications should not be encouraged or extended beyond the fair inferences to be gathered from the circumstances in each case. It would be an anomaly, justly to be deprecated, for all our

limited territorial boards, charged with certain objects of necessary local administration, to become the fountains of commercial issue, capable of floating about in the financial whirlpool of our large cities." (15 Wall., 572.)

In *Claiborne County v. Brooks*, this court, again through Mr. Justice Bradley, in reversing the ruling of the circuit judge to the effect that the county, under the power to erect a court house, had the implied power to contract out the work and to issue negotiable bonds of a commercial character in the payment thereof, said: "We cannot concur in this view. The erection of court houses, jails and bridges is amongst the ordinary political or administrative duties of all counties; and from the doctrine of the charge it would necessarily follow that all counties have the incidental power, without any express legislative authority, to issue bonds, notes and other commercial paper in payment of county debts and charges; and, if they have this power, then such obligations issued by the county authorities and passing into the hands of *bona fide* holders would preclude the county from showing that they were improperly issued, or without consideration, or for a debt already paid; and it would then be in the power of such authorities to utter any amount of such paper, and to fasten irretrievable burdens upon the county without any benefits received. Our opinion is, that mere political bodies, constituted as counties are for the purpose of local police and administration, and having the power of levying taxes to defray all public charges created, whether they are or are not formally invested with corporate capacity, have no power or authority to make or utter commercial paper of any kind, unless such power is expressly conferred upon them by law, or clearly implied from some other power expressly given, which cannot be fairly exercised without it." (111 U. S., 406, 407.) The court cited Police Jury v. Britton, 15 Wall., 566; The Mayor v. Ray, 19 Wall., 468.

In *The Mayor v. Ray*, in discussing the power of a municipal corporation to issue negotiable bonds to circulate as commercial paper, this court said: "A municipal corporation is a subordinate branch of the domestic government of

the State. It is instituted for public purposes only, and has none of the peculiar qualities and characteristics of a trading corporation, except that of acting in a corporate capacity. Its objects, its responsibilities, and its powers are different. As a local governmental institution, it exists for the benefit of the people within its corporate limits. The Legislature invests it with such powers as it deems adequate to the ends to be accomplished. The power of taxation is usually conferred for the purpose of enabling it to raise the necessary funds to carry on the city government and to make such public improvements as it is authorized to make. As this is a power which immediately affects the entire constituency of a municipal body which exercises it, no evil consequences are likely to ensue upon its being conferred; although it is not unusual to affix limits to its exercise for any single year. The power to borrow money is different. When this is exercised the citizens are immediately affected only by the benefit arising from the loan; its burden is not felt till afterwards. Such power does not belong to a municipal corporation as an incident of its creation. To be possessed, it must be conferred by legislation, either expressed or implied. It does not belong, as a mere matter of course, to local governments to raise loans. Such governments are not created for any such purpose. Their powers are prescribed by their charters, and those charters provide the means for exercising the powers; and the creation of specific means excludes others. Indebtedness may be incurred to a limited extent in carrying out the objects of the incorporation. Evidences of such indebtedness may be given to the public creditors. But they must look to and rely on the legitimate mode of raising the funds for its payment. That mode is taxation." (19 Wall., 475;) *Hill v. Memphis*, 134 U. S., 198, 203; *Young v. Clarendon Township*, 132 U. S., 340, 347, and other cases decided by this court are to the same effect.[1]

The city charter, we repeat, only authorized the city "*to borrow, for general purposes*, not exceeding $15,000, on the credit of the city." There is no *express* power to issue negotiable bonds, and the city could not, under the guise of an implied power springing from charter language, encumber the people with an indebtedness in the form proposed.

1. Bangor Sav. Bank v. Saltwater, 46 Fed. Rep. 899, 900.

It may be insisted, however, that the bonds in controversy have been held valid by our Supreme Court in the case of *Dwyer v. Hackworth* (57 Texas, 250, 251). In reply we say the question as to the validity of the bonds was not raised in that case. That suit was brought by Dwyer to enjoin the collection of certain taxes; the bond holders were not parties. The court disposes of the objection to the tax made by Dwyer, in reference to the bonds, in these words: "It appears from the agreed statement of facts, and the ordinance set out therein, that the city of Brenham, under its charter, had authority to borrow money for general purposes, and did so borrow, by selling its bonds, to the amount of fifteen thousand dollars. The validity of the tax levied to pay the interest on said bonds is not affected by the subsequent appropriation of the money borrowed to an alleged unauthorized purpose. Nor is it competent to enjoin the collection of said tax, on the ground of the invalidity of the bonds, *without making the holders of those bonds parties to the suit.* (Board v. Texas & Pacific Railway, 46 Texas, 316.) So far as it appears *from the agreed statement*, the tax of one-eighth of one per cent to pay interest and raise a sinking fund for the payment of said bonds was valid." It will thus be seen the court refused to entertain the question as to the *invalidity* of the *bonds*, because the *bond holders* were not *parties* to the record. Certainly the question before this court was not passed upon by the Supreme Court in that case. Upon this very point, see Lewis v. City of Shreveport, 108 United States—latter part of page 287—where this language is used: "All that was said by the Supreme Court of Louisiana must be construed in connection with the question then up for decision. *There is not a word about* the *validity* of the *outstanding bonds, nor of the right of the holders to recover upon them in a suit against the city.*"

The suit of Board v. Texas & Pacific Railway Co. (referred to by the court in the Hackworth case) was brought by citizens of Harrison county to annul certain proceedings had in the county court, ordering that bonds of the county should be issued to the railway company, and to enjoin the clerk of the court from attesting the bonds and the Chief Justice from issuing them, etc. The bond holders were not parties to the

suit. The plaintiffs insisted that as the holders of the bonds took them with the full knowledge of facts which rendered them invalid, it was unnecessary to make the holders parties. In reply, the court said: "But this is no answer to the objection that the *holders* of the bonds should be *parties to the suit;* for if they have no better title to them than said company, they are nevertheless entitled *to be heard before a decree is made in any way affecting their rights.*" (46 Texas, 329.) * * * * "Courts do not sit to determine *abstract principles*, but to decide practical issues, and settle controversies in which litigants have a substantial or immediate interest." (Ib., p. 329.) It is enough to say that the issue, as to the *validity* of the Brenham bonds, is neither touched upon nor affected by the decision in the case of Dwyer v. Hackworth, but that case does involve the legality of some of the proceedings of the municipal council, which will be hereafter noted.

If, however, in looking alone to the charter, it can be held that the city had power to authorize the bonds provided for in the ordinance of June 7, 1879, then it is submitted that the bonds are not the instruments authorized. The bonds *authorized* were redeemable, at the option of the city, in *five* years; the bonds *issued* are redeemable in *ten* years.

It is an elementary principle that, when a valid ordinance of a municipal corporation authorizes a certain thing to be done in a particular manner, the mode pointed out must be pursued. If municipal officers may disregard one requirement of the ordinance they may ignore another; and, pursuing the argument to its logical conclusion, they would have the power to bind the municipality without an ordinance at all. Such a doctrine will not be tolerated by the courts. It is said by the Supreme Court of Texas, in the case of *City of Bryan v. Page:* "The charter gave the power to employ legal counsel, but prescribed that the power be exercised by, or at all events in accordance with, an ordinance of the common council. The charter—the source of all the power of the mayor or council over the subject—having limited the mode of its exercise, they could not in a different mode make a valid contract; nor could they by any subsequent approval or conduct impart validity to such a contract. As without

an ordinance they were without power to bind the city by an express contract to pay for legal services, the law would not imply any such contract against the city. The law never implies an obligation to do that which it forbids the party to agree to do." (Brady v. Mayor of New York, 16 Howard's Practice, 432, cited in Zottman v. San Francisco, 20 Cal., 105); 51 Texas, 535; see, too, Color v. Cleburne, 131 U. S., 162.

In the present case the ordinance authorized the issuance of bonds redeemable in *five* years. The mayor executed a bond redeemable on its face in *ten* years. If the mayor had power, *ex mero motu*, to extend the term of redeemability of the bonds, he had like authority to enlarge the term of ultimate payment or change the rate of interest. But we maintain that he was without the power to do either. (C. & S. R. R. Co. v. City of Sparta, 77 Ill., 505; People *ex rel.* v. Town of Harp, 67 Ill., 62; McCoy v. Briant, 53 Cal., 250, 251.)

Thus far the argument has proceeded upon the assumption that plaintiff's pleadings on their face disclose a cause of action against defendant, in so far as the statement of facts, sufficient to authorize the issuance and sale of the bonds in question, is necessary for such purpose; but, it is insisted, that the same are fatally defective in failing to allege facts, sufficient under the law as it existed when the bonds were authorized and sold, to show the existence of such power.

Under the Constitution of Texas all cities do not stand upon the same footing as to the powers conferred in the issuance of bonds and imposition of taxes. One rule is prescribed for cities of over ten thousand inhabitants, and a different one for cities having less than that number. Brenham had, on the seventh day of June, 1879, and still has, less than ten thousand inhabitants, and while the fact is not apparent upon the face of the pleadings by direct allegation, the court will hold the allegations as applicable to cities of the less favored class, and require the pleader to set forth such facts as confer authority on the city of Brenham to issue the bonds in question. Employing the language of the Supreme Court, in the case of *Gould v. City of Paris*, "In testing this question, we have only to exam-

ine such provisions of our constitution as are applicable to cities of ten thousand inhabitants or less; for, although there was no proof as to the population of Paris on the tenth day of February, 1877, yet, as the plaintiff was seeking to coerce the city into the exercise of a power which it can possess only through the organic or statute law of the State, the *burden was on him to show* that this power had been granted. If granted to some cities, and not to others, it was in the necessary line of his proof to show that Paris was of the class thus favored by the State. Having failed to show that Paris contained more than ten thousand inhabitants, he cannot claim for it any powers especially granted to cities of that size which are not conferred upon cities of less population." (68 Texas, 517; see, also, Buchanan v. Litchfield, 102 United States, 287, *et seq.*) If it be necessary to make proof of authority to issue the bonds, it would seem to follow that the petition should state sufficient facts to let in the proof, for the latter must correspond with and conform to the former; and the allegations should be sufficiently specific to enable the court to determine whether the municipal body had lawful power to do the act claimed for it. Upon this point, it is said in *Hopper v. Covington:* "A demurrer admits only facts, and facts well pleaded. The town having but a limited authority to issue bonds for certain purposes, it is not enough for the plaintiff to aver in general terms that the town was authorized to issue the bonds in suit; but he must state the *facts which bring the case within the special authority.* There is nothing in this declaration, or in the copies of instruments annexed to and made a part of it, which shows, or has any tendency to show, for what purpose the bonds were made. The averment, that the defendant is a municipal corporation under the laws of Indiana, with full power and authority pursuant to the laws of said State, to execute negotiable commercial paper, is inconsistent with the public laws of the State, of which the courts of the United States take judicial notice. The averment, that the bonds held by the plaintiff were executed pursuant to the laws of the State, is but a statement of a conclusion of law, *which is not admitted by demurrer.* The declaration is fatally defective for not stating

the facts necessary to enable the court to judge *for itself* whether that conclusion of law has any foundation in fact." (118 United States, 151; see, also, Pumpelly v. Green Bay Co., 13 Wall., 166, 175; Cragin v. Lovell, 109 United States, 194; 3 Dill., 147; 76 New York, 564.

II.

As to the effect of the constitution of 1876 upon the power of the city of Brenham to issue commercial paper, it is maintained:

1. That, if the power to execute and issue negotiable bonds existed in the city *prior* to the adoption of the constitution, the constitution upon its adoption, superseded, abrogated and repealed such power and thereafter there existed in the city no power, express or implied, to execute and sell such securities; and

2. That, if after the adoption of the constitution the power to issue bonds existed under the grant of authority "to borrow money" on the credit of the city, the power was not in this instance exercised in conformity with the imperative requirements of the constitution, and that the bonds are therefore void.

In 1876, the present constitution of the State of Texas was adopted. (See Sayles' Annotated Statutes.)

Among other provisions contained therein, of force and applicable at the time the bonds were authorized, issued and sold, were the following:

"Cities and towns having a population of ten thousand inhabitants or less, may be chartered alone by general law. They may levy, assess and collect an *annual tax to defray the current expenses of their local government*, but such *tax* shall never exceed, for any one year, one-fourth of one per cent, and shall be collectible *only in current money*." * * * (Art. 11, Sec. 4.)

"The State tax, on property, exclusive of the tax necessary to pay the public debt, shall never exceed fifty cents on the one hundred dollars valuation, and *no county, city or town*, shall levy more than half of said State tax, *except for the payment of debts already incurred*, and for the erection of public buildings, not to exceed fifty cents on the one hundred dollars in any one year, and except as in this con-

stitution is otherwise provided." (Art. 8, Sec. 9, as it stood prior to the amendment of 1883.)

"Counties, cities and towns are authorized, in such mode as may now or may hereafter be provided by law, to levy, assess and collect the tax necessary to pay the interest and provide a sinking fund to satisfy *any indebtedness heretofore legally made and undertaken;* but all such taxes shall be assessed and collected separately from that levied, assessed and collected *for current expenses of municipal government,* and shall, when levied, specify in the act of levying the purpose therefor, and such taxes may be paid in the coupons, bonds, or other indebtedness for the payment of which such tax may have been levied." (Art. 11, Sec. 6.)

"The legislature may constitute any city or town a separate and independent school district. And when the citizens of any city or town have a charter, authorizing the city authorities to levy and collect a tax for the support and maintenance of a public institution of learning, such tax may hereafter be levied and collected, if, at an election held for that purpose, two-thirds of the tax payers of such city or town shall vote for such tax," (Art. 11, Sec. 10.)

But *no debt for any purpose shall ever be incurred, in any manner, by any city* or county, *unless provision is made at the time of creating the same,* for *levying and collecting a sufficient tax to pay the interest thereon, and to provide at least two per cent as a sinking fund.* (Art. 11, Sec. 7.)

And *no debt shall ever be created by any city,* unless *at the same time provision be made to assess and collect annually a sufficient sum to pay the interest thereon and create a sinking fund of at least two per cent thereon.* (Art. 11, Sec. 5.)

The provision of Section 5, Article 11, of the constitution is incorporated into Art. 427 of Revised Statutes.

"No county, city or other municipal corporation shall hereafter become a subscriber to the capital of any private corporation or association, or make any appropriation or donation to the same, or in any wise loan its credit; but this shall not be construed to in any way affect any obligation heretofore undertaken pursuant to law." (Sec. 3, art. 11.)

The foregoing are *all* the provisions of the constitution relating to cities of any class.

June 7, 1879, the city council of the city of Brenham passed another ordinance, entitled "An ordinance to provide for a just and equal valuation of property for the assessment of taxes." (See Rec., 25, for the ordinance in full.) This ordinance was declared illegal and void by the Supreme Court of Texas in *Dwyer v. Hackworth*, 57 Texas.

The annual current expenses of the city of Brenham for the year 1879, beginning April 1 of that year, exclusive of interest to accrue on the bonds, issued July 31, 1879, and a sinking fund of two per cent on the principal thereof, amounted to the sum of $4,097, in addition to which there was outstanding against the city a balance on former bonded indebtedness of $771.44. (Rec., p. 27.) The income of the city for the year 1879, from all sources, was by the city council estimated at $4,590. (Rec., p. 27.) The annual interest (10 per cent) on the bonds issued July 31, 1879, under alleged authority of the ordinance of June 7, 1879, amounted to $1500, and the (2 per cent) two per cent sinking fund to $300. (Rec., p. 27.) July 30, 1879, before the issuance of the bonds in question here, the valuation of property in the city of Brenham, subject to municipal taxation, as shown by the latest assessment, was $1,050,000. (Rec., 27.) The ordinance, under which the bonds were issued, appropriated *out of the general ad valorem tax of the city* one-eighth of one per cent, or so much thereof as might be necessary, to pay the interest on the bonds, and create a sinking fund for their payment at maturity. This one-eighth of one per cent, if it can be treated as the levy of *tax*—which, it would seem, it clearly cannot—would be effective only for the year 1879, and not for the succeeding years through which the bonds might run, and would yield but $1,312.50. (Rec., 27.)

The provisions of the constitution, upon which reliance is placed by the plaintiff in error, as showing *an absolute want of authority* upon the part of the city of Brenham to issue the bonds in controversy, have been construed by the Supreme Court of Texas in the cases of *Waxahachie v. Brown*, 67 Texas, 524, and *Gould v. City of Paris*, 68 Texas, and more

recently in the cases of *City of Terrell v. Dessaint*, 71 Texas, 770, and *Citizen's Bank v. City of Terrell*, 78 Texas, 450; and in each case the bonds were declared void because of constitutional prohibitions and restrictions upon the debt-creating and taxing powers of cities.

In *Gould v. City of Paris*, the court, in construing section 4, article 11, of the constitution (supra, 27), and section 9, article 8 (supra, 27), as it stood prior to the amendment of 1883, with the view of determining the extent to which the city of Paris, a municipality having less than ten thousand inhabitants, might exercise the taxing power, said, Chief Justice Willie delivering the opinion: "The first of these sections (sec. 4, art. 11,) contains a grant of power to levy taxes for a particular purpose, and, if it stood alone, might be construed not to prohibit taxation for other objects, if authorized by the Legislature. But the other section (sec. 9, art. 8,) is clearly prohibitive, and fixes the maximum of *ad valorem* taxation, whether levied by cities, counties or towns, at one-half of the State tax, with certain exceptions. The only exception, named in the section itself, is the tax for the erection of public buildings.

"If there be other exceptions, they are to be ascertained by reference to other portions of the constitution. The only section claimed as making an exception to the general rule laid down in section 9, article 8, is the above recited section 4 of the 11th article of the constitution; but this cannot, in a case where the State has levied fifty cents on the one hundred dollars, be said to fix a maximum different from that prescribed in the other section. Hence, in such a case, it cannot be said to be an exception, so far as the maximum per cent of taxation is concerned. If the State levies less than fifty cents on the hundred dollars, then, doubtless, a city of ten thousand inhabitants or less could still levy one-fourth of one per cent by virtue of article 11, section 4. A different maximum could be prescribed and the special grant in the last section would prove an exception to the general grant contained in the other. (Lufkin v. Galveston, 63 Texas, 557.) In the case just cited, it was held that the city of Galveston, containing, as it did, over ten thousand inhabitants, could, by authority of the constitution, levy a tax of

one hundred and six cents on the one hundred dollars, that amount being allowed by the special authority given in article 11, section 5, of the constitution. Article 8, section 9, was held to be the general rule as to taxation, where there were no exceptions prescribed; and a different maximum being prescribed for cities of over ten thousand inhabitants, they were entitled to tax up to that maximum. The converse of this proposition is also true, that where the limit is the same, the one clause is no exception to the other, and this is the case so far as the smaller class of cities is concerned.

"The limitation of one-half the State tax applies to such taxes as are levied for city purposes, which would include current expenses. Reading the two sections together, a city of the smaller class could levy one-fourth of one per cent for current expenses alone, but could not go beyond that amount for any and all corporate purposes, saving those made the subject of special exceptions by the constitution itself. In other words, the constitution said that these smaller cities might levy twenty-five cents on the hundred dollars for current expenses, but when they have done so they have reached the limit beyond which they are prohibited to go, and they shall levy no other tax except for the other purposes mentioned in the constitution. If the State should levy less than fifty cents on the hundred dollars and their limit should thereby be reduced to less than twenty-five cents on the hundred dollars, they may still impose that amount of tax for current expenses. Should they not need so large a tax for these expenses they might levy a smaller amount, and also another tax for other separate purposes, provided that the two together did not exceed one-half of the (authorized) State tax, or twenty-five cents on the hundred dollars." (68 Texas, 517–519.)

The court held in this case, that the constitution, of force when the contract was made, *limited the power to contract by the power to tax*, and that the city, having reached the limit of its taxing power, by having previously levied a tax of one-fourth of one per cent for current expenses, could not further exercise the power to tax, as was sought to be done by levying a tax of one-tenth of one per cent for the

purpose of paying the principal and interest of the bonds. (68 Texas, 519.)

The constitution plainly limits the right to provide for current expenses to the imposition of *a tax*, and does not confer the power to *issue bonds for such purposes*; and in all its provisions, referring to municipal corporations, is essentially restrictive. Justice Robertson, in *Cleburne v. Railway Company*, says: "Municipal powers are strictly construed in the United States, and the entire article in the constitution of 1875, on municipalities, indicates a determination to impose new limitations on the powers of cities, towns and counties." (66 Texas, 461.) In *City of Waxahachie v. Brown*, it is said: "But the policy of our laws seems to be to restrict municipal corporations as to the *creation of debts*, and not merely as to the issuance of bonds." (67 Texas, 531.)

Discussing section 2, article 12, of the constitution of Nebraska—similar in its general effect to the constitution of Texas—this court says: "On the contrary, we regard the entire section as a prohibition upon the municipal bodies enumerated, in the matter of creating and increasing the public debts, by express and positive limitations upon the legislative power itself." (Dixon County v. Field, 111 U. S., 89; Dillon on the Law of Municipal Bonds, p. 37, sec. 16.) In determining, therefore, the questions involved in this branch of the discussion, it is scarcely necessary to look further than our own constitution and the laws of the State; for, as stated by Justice Gaines, in Waxahachie v. Brown (referring to the conflict of authorities touching questions affecting the validity of municipal bonds): "A discussion of these authorities, however, would lead to no profitable result at this time, since, in our opinion, the provisions of our constitution and statutes, relating to the power of municipal corporations to levy taxes and create debts, *are decisive of the point now before us.*" (67 Texas, 527.)

It is a fundamental rule in the construction of the *taxing* power of municipal bodies, and one accepted by all the authorities, that the grant or power should be construed with strictness, "and the reasonable presumption is held to be,

that the State has granted, in clear and unmistakable terms, all it has intended to grant at all." (Cooley on Taxation, p. 209.) The grant of power may be withdrawn at the pleasure of the State. (42 Texas, 658.) "And it is," says Mr. Cooley, "also a familiar rule that, in the execution of the power to tax, the municipalities must confine themselves clearly within the power conferred." (Ibid, 257; Williams v. Davidson, 43 Texas, 36, 37.) "They cannot, therefore, tax except for the *very purpose* allowed by law, and in the manner and under the conditions prescribed by law." (Ibid, 253, 254; Blessing v. City of Galveston, 42 Texas, 658.)

The right to tax is a dangerous power, involving "the power to destroy," and the defendant could only impose a tax for *authorized* municipal purposes, and a departure therefrom would necessarily vitiate the tax.

It is important to note that the charter of defendant was passed by the Legislature in 1873; the new constitution was adopted in 1876; and the ordinance authorizing the bonds in suit was passed June 7, 1879. It will, therefore, be observed that we are not now considering the effect of legislation enacted *under* the constitution, but rather the effect the constitution has upon legislation enacted *prior* to its adoption. The provisions of a municipal charter may be valid as construed in the light of an existing constitution, but wholly void when applied to a constitution thereafter adopted. This principle finds illustration in the cases of ~~*Aspinwall v. Commissioners of the County of Daviess* (22 How., 364)~~; Town of Concord v. Saving Bank (92 U. S., 628, et seq.); Concord v. Robinson (121 U. S., 170,) and others. If, therefore, the constitution of 1876 superseded the charter of 1873, so far as the power to issue bonds is concerned, the ordinance of June 7, 1879, becomes wholly illegal. The true intent and meaning, consequently, of the constitutional provisions pertinent to this inquiry, must be determined. In construing a provision of the organic law, "*the object to be accomplished, or the mischief designed to be remedied* or *guarded against*," may be considered. (Cooley on Const. Lim., fifth ed., 79.) And the policy of new provisions may be sought in the history of the times touching the same, and the state of previous legislation. (Anthony

v. Jasper County, 4 Dill., 143, 144; s. c., 101 U. S., 696; Concord v. Robinson, 121 U. S., 167; Dixon County v. Field, 111 U. S., 89.) Referring to the history of the issue of municipal bonds, in Missouri, it is said by Judge Dillon, in the case of *Anthony v. Jasper County*, that "to prevent such improper or imprudent issue of bonds in the future, the Legislature passed the act of March 30, 1872." (4 Dill., 143.) And, on page 144, the same judge proceeds: "The principle involved is one of great consequence. For illustration: Loose and general powers have been heretofore given in this State to municipalities and counties, to issue such bonds. This power has been taken away by the new constitution."

In the opinion, affirming the judgment in the *Anthony Case*, the Supreme Court use this language: "The object of the new legislation undoubtedly was to guard against unauthorized issues of this class of public securities. For this purpose a *new policy* was adopted by the State." (101 U. S., 696; Robertson v. Breedlove, 61 Texas, 324.) To the same effect are the decisions of this court in reference to the issuance of bonds by municipal bodies in Kansas, Nebraska and other States. Municipal corporations in Texas in 1875—when the constitution was framed and submitted to the people—constituted no exception to the general rule. Bonds, acquiring by transfer to purchasers for value all the incidents of ordinary negotiable securities, had been issued by various towns and counties of the State, and the holders subsequently, as is usually the case, were required to bring suits to enforce their collection. The city of Houston, notably, may be mentioned, and the records of the circuit court, at Galveston, will attest the accuracy of this statement. The cities of Galveston (Loonie v. Galveston, 54 Texas, 517,) and San Antonio (28 Texas, 19; 32 Ib., 405; 34 Ib., 50; 47 Ib., 548,) and the counties of Anderson (59 Texas, 666,) and Harrison (Board v. T. & P. R'y Company, 46 Texas, 316,) and others may also be included in the enumeration. It was to prevent the imposition of burdensome taxation and the indiscriminate issue of municipal bonds, with all the incidents attaching to commercial paper, that new and restrictive provisions were incorporated into the constitution—

features not to be found in any prior constitution of the State. Remark may also be made, and it is significant, that, in all suits (so far as we are advised) instituted to enforce collection of bonds issued by cities and counties under our new constitution, the power to issue them has been invariably denied. (See *Gould v. City of Paris*—fire engine bonds—68 Texas, 511; *Waxahachie v. Brown*—school bonds—67 Texas, 524; *Robertson v. Breedlove*—court house bonds—61 Texas, 324; *Terrell v. Dessant*, 71 Texas, 770; *Citizens' Bank v. Terrell* 78 Texas, 450.) The principles enunciated in the cases last cited clearly reflect the "new policy" inaugurated by the people of Texas in the adoption of the present constitution.

With the above rules of construction and established legal principles in view, let us examine the provisions of the constitution already quoted, *supra*.

These provisions limit the power of a city to tax to the following purposes:

1. To defraying *current expenses*—one-fourth of one per cent. (Art. 11, sec. 4.)

2. To payment of *debts already incurred* and for the *erection of public buildings*, for which a tax in excess of one-fourth of one per cent may be levied. (Art. 8, sec. 9; art. 11, sec. 6.)

3. To "the support and maintenance of a *public institution of learning*," under certain circumstances. (Art. 11, sec. 10.)

It is not claimed in this suit that the bonds were issued to erect public buildings, or to fund or discharge an existing indebtedness, or for school purposes. We are dealing with bonds issued, as upon their face recited and expressed in the ordinance, for general purposes, and to provide for the payment of which there was "appropriated out of the general ad valorem tax of the city one-eighth of one per cent, or so much thereof as may be necessary, on the assessed value of the taxable property of the city." (See ordinance, *supra*.)

The provision of the constitution having direct bearing upon the bonds in suit and the tax levied for their payment, will be found in article 11, section 4; and, under the terms of that section, the authority of defendant was limited,

*first*, as to the *amount* of the tax, and, *second*, as to the *purpose* for which it should be levied. The amount, or rate, is limited to one-fourth of one per cent, and the purpose, to defraying the *current expenses* of its local goverment; and, in that event, the command is imperative that the tax *shall* be collected only in *current money*. It is true that corporate functions must be performed and municipal purposes carried out, and moneys necessary for the objects indicated must be provided; but, to perform the one and carry out the other, the constitution expressly authorizes the imposition of a tax; and, the means being provided, the mode of raising them enjoined by the constitution must, under all the authorities, be pursued by the municipal body. For the "general purposes" of municipal government, moneys are raised *by taxation—not by the issuance of bonds*—and it was the evident purpose of the constitution to remove all possible doubt on the subject. The payment, out of moneys raised by taxation, of interest and principal of bonds issued for general corporate purposes, is but *a diversion of municipal revenues from a legal to an illegitimate purpose*, and will not be permitted. This principle is well expressed by Mr. Justice Bradley, in Chisholm v. City of Montgomery: "A municipal corporation is but a subordinate branch of the government; it represents the State sovereignty in a limited district and for specified purposes. Those purposes are local government and police. The *power* of *taxation is granted as a means of carrying out these purposes.* The diversion of these revenues *to other purposes* is *unlawful and ultra vires.*" (2 Woods' C. C. Rep., 594; see, too, 78 Texas, 460.)

Cities and towns are not trading corporations, with power to impose burdens *ad libitum* upon the people. They must pursue *strictly* the terms of the grant conferred by the State. No power, in the constitution, is given to defray expenditures for corporate purposes *by borrowing money*, much less to raise money *by the issuance and sale of negotiable securities running through a series of years, with the inevitable interest bearing coupons attached.* (2 Woods' C. C. Rep., 285.) Let us consider the effect of such a doctrine. Suppose a city have the right to levy a tax to defray current

expenses; these expenses annually amount to fifteen thousand dollars; a tax is levied sufficient to pay the amount; at the end of the year the fifteen thousand dollars is paid and the account is balanced. But, go further, and suppose that, instead of levying the tax, the city *borrows* the money for corporate purposes and issues, in evidence thereof, bonds for fifteen thousand dollars, maturing in twenty years, bearing ten per cent interest, and having semi-annual interest bearing coupons attached. How, then, stands the account? Annual interest of one thousand five hundred dollars must be paid, amounting, at the end of twenty years, to thirty thousand dollars, and, when that is satisfied, the city still has upon its hands the original debt of fifteen thousand dollars to discharge. Thus it appears that, in addition to repaying the amount originally borrowed, the incidental amount of thirty thousand dollars must be raised by taxation. But, had the method of the constitution been pursued, the entire transaction would have been closed the first year by the payment of only fifteen thousand dollars, the amount of current expenses. (Terrell v. Dessaint, 71 Texas, 770.)

It is, therefore, insisted that the defendant was without power to levy the tax to pay the principal and interest of bonds in suit, and, in the absence of authority to levy the tax, the contract between the plaintiff and defendant, as evidenced by the bonds and coupons, *is void.* Employing the language of the Supreme Court upon this point: "It follows that in this class of cases the *right to contract must be limited by the right to tax*, and if, in the given case, no tax can lawfully be levied to pay the debt, the *contract is void for want of authority* to make it." (Gould v. Paris, 68 Texas, 516, citing Loan Association v. Topeka, 20 Wall., 660.)

The ordinance authorized the coupons to be received in payment of general *ad valorem* taxes; and is, therefore, plainly violative of the constitution.

The constitution is mandatory in requiring municipal taxes to be collected in money. The injunction is: "But such tax shall *never exceed*, for any one year, *one-fourth of*

*one per cent*, and shall be *collectible only in current money.*" (Art. 11, Sec. 4.) What is the effect of the ordinance? As elsewhere stated, the latest assessment of taxes—which, under the constitution, as construed in *Citizens Bank v. Terrell*, 78 Texas, 457, must furnish the standard by which to measure the power to tax in making provision for the payment of a contemplated debt—disclosed (when the ordinance was passed) assessable property valued at *one million and fifty thousand dollars.* One-eighth of one per cent (the amount appropriated by the ordinance) would yield a revenue of only one thousand three hundred and twelve dollars and fifty cents. But, the annual interest on the bonds, amounts to one thousand five hundred dollars. Thus, it will be seen, that the special bond fund would not only be absorbed by the receipt of the coupons, but also a large part of the *general ad valorem tax* levied to pay "current expenses" incurred for other corporate purposes, and this in palpable violation and disregard of the constitution. (Bank v. Terrell, 78 Texas, 460.) Repeating the language of Mr. Justice Bradley: "The diversion of these revenues to other purposes is unlawful and *ultra vires.*" (2 Wood's C. C. Rep., 594.)

No legal provision, in the ordinance of 1879, was made for the interest and sinking fund of these bonds, and the provision attempted to be made was inadequate.

The requirement of the constitution (Art. 11, Sec. 7, and Art. 11, Sec. 5,) *that provision shall be made, at the time of creating a debt, by the levy of a tax* sufficient, *annually*, to pay the interest and, at least, two per cent as a sinking fund, is imperative. (78 Texas, 456.)

In this instance, not only was *no tax levied* to meet interest and create a sinking fund (the provision attempted being an unlawful appropriation, merely, out of an existing tax for "current expenses," expressly appropriated to such purpose by the constitution (78 Texas, 460); but the provision attempted was inadequate and did not extend beyond the year 1879—no provision whatever being made, at the time of authorizing the bonds or afterwards when they were sold,

for the other years beyond 1879 they might run. (78 Texas, 456.)

In *Terrell v. Dessaint*, suit was brought upon a promissory note, held by the said Daissant, which read as follows: "$1,000. Two years after date the City of Terrell promises to pay P. H. Layen, or order, $1,000, for value received, with interest at 7 per cent from date. This note is given in payment for material for waterworks supplies, and *is payable out of the tax of one-fourth of one per cent collected annually for general purposes.*" It was dated May 13, 1885 and was signed by the Mayor and Secretary of the city. At the time of the execution of the note the city had leased or sold its waterworks to the Texas Gas and Water Company which had been in the possession of the property for some time. The management of the company not being satisfactory, it was agreed that its contract with the city should be rescinded, and that the city should resume possession of the works. As part of the contract of rescission, the city agreed to purchase from the company certain material on hand for the extension of the works and to pay therefor, the sum of two thousand dollars. For this sum the city issued drafts on its treasurer for about five hundred dollars, and executed two promissory notes, one being the note above set out.

Justice Gaines, in delivering the opinion of the court, after quoting the parts of Sec. 5, Art. 11, and Sec. 7, Art. 11, of the constitution (quoted *supra*,) said: "In Corpus Christi v. Woessner, 58 Texas, 462, it was intimated that there might be a question whether the provisions quoted applied to cities other than such as have more than ten thousand inhabitants; but the determination of the point was not necessary to the decision of that case, and it was not decided. The question is presented in the case before us, and we are of opinion that they must be held *to apply to all cities alike.* It is true that Section 5 relates, mainly, to cities having more than ten thousand inhabitants, and provides that they may be chartered by special acts of the legislature, and fixes the limits of their taxing power. Section 7 also relates, in the first place, to counties and cities upon the sea coast, and authorizes them to levy and collect taxes for the construction of sea walls, break waters and

sanitary purposes, and to create debts for these objects. But the provisions we have quoted contain no word or words which restrict their application to the cities previously mentioned in the same section. The language is general and unqualified, and we find nothing in the context to indicate that the framers of the constitution did not mean precisely what is said; *that is, that no city should create any debt without providing, by taxation, for the payment of the sinking fund and interest.*

"At the time the constitution was framed the history of the country and of the State afforded examples of municipal corporations which had become bankrupt through the reckless and extravagant management of their governing bodies, and its framers, doubtless, had under consideration the evils which result, both to the tax payers and the creditors of such corporations, from an unlimited power to create debts. From article 8, on taxation, and article 11, on municipal corporations, they seem to have kept prominently in view two objects—the one, to protect the inhabitants of municipalities against oppressive taxation; the other, to protect the creditors and to preserve the financial honor of such corporations. The first, was sought to be accomplished by section 9 of article 8, (since amended in pursuance of its original policy and spirit,) which fixes the limit of taxation and defines the purposes for which taxes may be assessed. The second, was intended to be attained by the section last named, in connection with the provisions quoted from sections 5 and 7 of article 11, which *limits the power of creating debts by making it proportionate to the power of taxation.* Such being, as it seems to us, the evident purpose of the framers of the constitution, we have no doubt that, although a specified class of cities had been previously mentioned in each of the sections from which we have quoted, when they said that no city should create any debt *without providing for the payment of the interest and sinking fund thereon,* they meant that the words should be construed according to their literal import, and not to restrict them to the class of cities which have been formerly mentioned in the same section." (71 Texas, 773, 774.)

In the same case, in determining what should be consid-

ered the creation of a debt prohibited by the constitution, the court further said: "It is held in the case previously cited (Corpus Christi v. Woessner) 'that the issue of warrants on the current expenses of the city, which do not exceed the current revenue derived from taxation,' is not the creation of a debt prohibited by the constitution. We do not doubt the correctness of this view. We freely concede that debts, for the ordinary running expenses of the city, payable within a year, out of the incoming revenues of the year, with other indebtedness not clearly in excess of the yearly income for general purposes, can be created by a city. But we think that a debt for current expenses, in order to be valid without a compliance with the constitutional and statutory requirements, to which we have referred, must run *concurrently with the current resources for such purposes, and that such a debt cannot be created, without such compliance, which matures at such time as would make it a charge upon the future resources of the city.*" (71 Texas, 774, 775.)

In *Bank v. Terrell*, where suit was brought to recover the amount of certain overdue coupons upon the bonds issued by the city of Terrell, payable to bearer, in which the defence was want of authority under the constitution and laws of the State to execute the obligation, the Supreme Court of Texas, in a careful opinion, considered the effect of the constitutional provisions referred to upon the power of the city to execute and sell negotiable securities. (78 Texas, 450, 454.)

After quoting article 8, section 9; article 11, section 4; article 11, section 5; and, article 11, section 7; the court, through Justice Henry, said: "A city cannot create a debt unless the power to do so is either, expressly or impliedly, conferred by law. If the law prohibits the creation of the debt for any purpose, then no attempt to create one would have any force. If the law permits the creation of debts for specified purposes only, an attempt to create one for a purpose not specified would be without validity. If the law authorizes the creation of debt for a specified purpose, *but limits the amount and prescribes the manner of creating such debt*, any attempt to create one greater than the amount spe-

cified or without substantially observing the regulations prescribed, would be equally without force.

"While our constitution authorizes the creation of a debt and the issuance of its negotiable bonds by the defendant city to provide for constructing water works, its mandate is imperative, *that no such debt shall be created without making provision, at the time of its creation, to assess and collect annually, a sufficient sum to pay the interest thereon and create a sinking fund of at least two per cent on the principal.* Until this is done, the *debt is not created and none exists.* If not forbidden, by another provision of the constitution, the levy may provide for the collection of a greater sum than the interest contracted for, and two per cent additional, but it cannot be less than that. The language is plain and unambiguous, *and in relation to cities the command is twice given. The provision must be sufficient when made.* If it subsequently becomes more or less than sufficient the validity of the obligation would not be affected.

"By another provision of the constitution the per centage upon the assessed value that may be levied is limited. The constitution, in effect, commands that a city, with less than ten thousand inhabitants, shall, in order to create a debt, take its latest assessment of property for taxes, and from that ascertain how much money a tax of twenty-five cents on the one hundred dollars of valuation will produce, and it may create a debt that that amount will provide for the payment of the interest on and two per cent per annum additional. The rule applies with all its force to cities having more than ten thousand inhabitants, except that the limit of the per centage of taxation is greater.

"The command of the constitution *that no debt should be created* without, *at the same time, providing for the levy and collection of a tax for its payment,* was evidently designed not more to ensure the payment of honest debts than to admonish the people whose property was being charged with them of that fact.

"The other provision, limiting the amount of debt that cities can charge themselves with, had its foundation in a wise public policy. These constitutional provisions are

made for observance, not evasion." (78 Texas, 455, 456, 457.)

"The command of our Constitution is, that, *when the debt is created, provision shall then be made for the levying and collecting a tax to discharge it.* It amounts to more than a direction that no debt shall ever be created above such a sum as the directed levy will pay. The Constitution will not be obeyed unless it shall be ascertained, *when and before the debt is created,* whether one-fourth of one per cent or less, on the taxable valuation, will *annually* pay the interest and sinking fund. The debt is not to go beyond *what a tax can be levied to pay,* and the clause in the Constitution that defines how much may be levied shows that it is to be done on a "valuation," one meaning of which, given by Webster, is "appraisment, as a valuation of land for the purpose of taxation." (78 Texas, 459.)

From the foregoing extracts it is clear that *no debt was created by the issuance and sale of the bonds issued by the city of Brenham under the ordinance of June* 7, 1879. When the city council enacted said ordinance, the taxable values of the city of Brenham, as shown by its latest assessment, amounted to one million and fifty thousand dollars. A tax of one-fourth of one per cent, or twenty-five cents on the hundred dollars valuation, would produce the sum of twenty-six hundred and twenty-five dollars, the maximum revenue which the city on its taxable values could secure through the exercise to its utmost limit of its taxing power for general purposes, or "current expenses."

For other *special* purposes authorized by the Constitution, viz: the payment of debts incurred prior to its adoption, or the erection of public buildings, the city might, within the limits authorized by the Constitution, levy and collect an additional tax. But the bonds in question were not as before observed, authorized or issued for either of such *special purposes;* and, hence, the provisions of the Constitution authorizing a levy beyond one-fourth of one per cent for current expenses cannot be invoked in aid of these bonds. As already stated, the annual current expenses of the city of Brenham for 1879, amounted to $4,097 without taking into consideration interest to accrue on the bonds ($1,500), two

per cent as a sinking fund ($300), and $771, due on former bonded indebtedness. With these items included the total current expenses for 1879 aggregated $5,897, to defray which the income of the city from all sources was but $4,590. To meet the interest and create a sinking fund *no levy of tax was made*, in the ordinance authorizing the bonds, or prior to or at the time of their issuance and sale, *as peremptorily required by the Constitution;* but, in lieu thereof, an appropriation, *out of a tax already levied for current expenses*, of one-eighth of one per cent, which appropriation ran but for the year 1879 and produced but $1,312.50 an amount far short of the interest and sinking fund for even one year. Besides, the interest coupons were made receivable for taxes levied for "current expenses," expressly required *to be collected in current money;* and a part of the current revenues arising from the tax imposed to defray current expenses, and devoted by the Constitution to the support of the city government, was without authority appropriated and devoted to the payment of interest and sinking fund. (Citizens Bank v. Terrell, 78 Texas, 460.)

Provisions are frequently made in constitutions or in charters or legislative acts, says Mr. Dillon, to prevent the creation or increase of municipal indebtedness beyond specified limits, or except upon certain conditions. Such limitations have been found by experience to be necessary to prevent extravagance, are remedial in their nature, are based upon the wise policy of paying as you go, and ought, therefore, to be construed and applied to secure the end sought. (1 Dill. on Municipal Corporations, sec. 130.)

Under a charter, prohibiting the common council of a city from "authorizing any expenditure for any purpose," in the current political year, exceeding the annual tax levy, the council cannot authorize any expenditure to be made within the year exceeding the limit; but they are not forbidden to authorize in that year an expenditure to be made in a subsequent year, for services to be performed in such subsequent year. (Weston v. Syracuse, 17 N. Y., 110.) The charter of Chicago contained the provision that "no contract shall be made by the common council, and no expense incurred unless an appropriation shall have been previously

made concerning such expense," and the comptroller is required to submit each year an estimate of the amount necessary to defray the expenses of the city for the current year. With this provision in force the city made a contract with a gas company, whose works were already complete, to take gas for its streets and public buildings at a specified price for the period of ten years. This contract was held invalid on the ground, among others, that, under the above charter provision, there was no actual or reasonable necessity to make a contract extending over ten years, no appropriation having been made commensurate with the obligations of the contract. (Garrison v. Chicago, 7 Bissell, 447; 1 Dill. on Municipal Corporations, sec: 131.)

A municipal charter provided that it should not be lawful for the city council to make, or authorize to be made, "any contract for the payment of money beyond the current fiscal year," declaring every such prohibited contract "illegal and void." In construing this language the court says: "By this section of the charter, the legislature have, in the most explicit manner, prohibited the city council from contracting any debt beyond the fiscal year. If the city council had, at the time the contract was made in 1845, passed an ordinance that the expense of lighing the streets for that year should be paid in 1848, by a tax then assessed for that purpose, it would have come within the letter of the prohibition. It is none the less a violation of its spirit that the council did not pass the ordinance providing for its payment until 1848." (Jonas v. Cincinnati, 6 Ohio St., 318, 332. See, too, 1 Dillon on Municipal Corporations, 4th Ed., Sec. 134 and notes.)

The constitution of California provides that no municipal corporation "shall incur any indebtedness or liability in any manner or for any purpose, exceeding in any year the income and revenue provided for it for such year, without the assent of two-thirds of the qualified electors thereof voting at an election to be held for that purpose," and this provision is held to mean that, subject to the exception, "each year's income and revenue must pay each year's indebtedness and liability, and that no indebtedness or liability in any one year shall be paid out of the income or revenue of

any future year." (San Francisco Gas Works v. Brickwedel, 62 Cal., 641.) By the constitution of Colorado "no county shall contract any debt by loan in any form except for the purpose of erecting necessary public buildings," etc., and "the aggregate amount of indebtedness of any county for all purposes, exclusive of debts contracted before the adoption of this constitution, shall not exceed at any time, a specified rate. The Supreme Court of that State, ruling upon a contention that the limitation was upon indebtedness "by loan," held that, while these two propositions are associated they are none the less independent declarations;" that, in determining the amount of indebtedness at any time, county warrants are to be taken into the account, all those which increase the indebtedness beyond the amount limited being void; that the county authorities, as well as the parties dealing with them, are bound to take notice of the limit prescribed in the constitution, (People v. May, 9 Col., 81; see, also, 130 U. S., 662; Ib. 674; 1 Dill. on Mun. Corp., 4th Ed., Sec. 134); and that the limitation includes debts incurred by operation of law as well as those arising upon express contracts, but does not include involuntary liability arising *ex delicto*. (May v. People, 9 Col., 404.)

The constitution of Iowa contains the provision that "no county or other political or municipal corporation, shall be allowed to become indebted in any manner, or for any purpose, to an amount exceeding five per cent on the value of the taxable property within such county or corporation, to be ascertained by the last State and county list, previous to the incurring of such indebtedness." Under this provision, as construed by the Supreme Court of the State, no indebtedness, for whatever purpose created, is exempted from the operation of the prohibition, and it applies to negotiable bonds issued under legislative authority as well as to other debts; and the creditor or bondholder must at his peril take notice that the constitutional limit is not exceeded. (See 78 Texas, 460.) Substantially similar provisions in other constitutions, have received a like construction. (Bank v. School District, 39 Io., 490; French v. Burlington, 42 Io., 614 and cases cited; 1 Dill. on Mun. Corp., Sec. 135, note 1.)

Under the constitutional provision in Illinois which reads

thus: "No county, city or township, school district, or other municipal corporation shall be allowed to become indebted in any manner or for any purpose, to an amount including existing indebtedness, in the aggregate exceeding five per centum on the value of the taxable property therein, to be ascertained by the last assessment for State and county taxes, previous to the incurring of such indebtedness." (Cons. 1870, Art. 9, Sec. 12,)—the Supreme Court of the State has established the doctrine that a corporation is prohibited from becoming indebted in any manner or for any purpose, beyond the limit, even for necessary current expenses. (Springfield v. Edwards, 84 Ill., 626; Prince v. Quincy, 105 Ill., 138, 215.) It cannot incur corporate indebtedness beyond the limit in anticipation of the collection of taxes levied; and such indebtedness and the evidences thereof are void. (Law v. People, 87 Ill., 385; Fuller v. Heath, 89 Ill., 282.) But a corporation may issue a warrant for authorized expenses drawn against taxes actually levied and to be collected for the purpose, which warrant, while not creating a debt or liability against the corporation, may yet operate as an assignment of so much of the particular taxes when collected, and such warrant may be made receivable for taxes. (1 Dill. on Mun. Corp., 4th Ed., Sec 136.)

The constitution of Indiana contains a provision, substantially identical with that of Iowa and Illinois before referred to, under which it is held that a city whose indebtedness has reached the limit cannot create a further debt even for necessaries. (Sackett v. New Albany, 88 Ind., 473; 1 Dill. on Mun. Corp., (4th Ed.) note 1, page 205.)

The constitution of Pennsylvania provides that: "The debt of any city, except as herein provided, shall never exceed seven per centum upon the assessed value of the taxable property therein." The city of Erie made a contract with private persons for the erection of a market house, by the terms of which the city agreed to pay, for twenty-five years, a rental of $1500 per annum. A bill in equity was filed by taxpayers, stating the above contract, also that the indebtness of the city was already in excess of the seven per centum limit, and praying for an injunction to restrain the city from paying any money on the said contract. The de-

fendant filed a general demurrer. As it did not appear upon the face of the bill that the annual revenue, after meeting the other municipal liabilities, was sufficient to meet the proposed contract liability, the court held, on the facts before it, that the contract, if sustained, would create an indebtedness in violation of the constitution, and granted the injunction. (1 Dill. Mun. Corp. 4th ed., Sec. 136 and notes.)

Again, the bonds, if authorized, do not specify the purpose for which they were issued; nor have they ever been registered with the comptroller, as the law requires; nor do they contain recitals showing that these requirements have been complied with.

How far the provisions of the Revised Statutes of Texas relating to municipal corporations, and in particular articles 421 and 423, are applicable to a city like Brenham operating under a special charter, granted prior to 1876, is not clear (Bank v. Terrell, 78 Texas, 457; 1 Dill. on Mun. Corp., 4th ed. sec. 87.)

Let it be assumed, however, that the sections referred to have application, and the illegality and nullity of the bonds becomes still more apparent. The proposition just stated asserts that the bonds contain no recitals that the law regulating their issuance has been complied with; further, that they do not specify the purpose for which they were issued, and contain no recital or intimation that they have been registered by the Comptroller. The recitals of the bonds are as follows: "This bond is redeemable by the city of Brenham after the expiration of ten years from date hereof. This bond is authorized by an ordinance of the city of Brenham, approved May 7, 1879." The bond is set out *in extenso* on page 12, *supra.*

The articles referred to, in force at the date of the passage of the ordinance (June 7, 1879,) and the issuance of the bonds (July 31, 1879,) provide:

"Art. 421. All bonds shall specify for what purpose they were issued," etc. * * * *

Art. 423. It shall be the duty of the mayor, whenever any bond or bonds are issued, to forward the same to the

Comptroller of Public Accounts of the State, whose duty it *shall be* to register said bond or bonds in a book kept for that purpose, *and* to *endorse* on *such bond so registered his certificate of registration*, and to give, at the request of the mayor, his certificate certifying to the amount of bonds so registered in his office up to date." See, in this connection, Art. 424, R. S. .

The foregoing statutory provisions are but re-enactments of sections 77 and 79 of the act of March 15, 1875, (Gen. Laws 1875, p. 134, secs. 77 and 79,) carried forward in the Revised Statutes. (Gould v. City of Paris, 68 Texas, 517.) In the Case of Gould, speaking of the act of 1875, Chief Justice Willie says: "The act of 1875 was in force when our present constitution took effect, and remained in force thereafter, and at the time this contract was made, except in so far as it was repugnant to the constitution." (Page 517.)

There are no *charter* provisions of defendant regulating the manner of issuance of bonds, nor prescribing what the recitals of the bonds shall contain, and none requiring the registration of the bonds nor the certificate of the Comptroller to be endorsed thereon. Hence we must look to the constitution and General Laws, as it is expressly provided, in the charter of defendant, that the city of Brenham "may ordain and establish such acts, laws, regulations and ordinances, *not inconsistent with the constitution and laws of this State or of the United States*, as shall be needful for the government, interest, welfare and good order of said body politic." (Printed Charter and Ordinances, p. 5, sec. 1, art. 1, of the Charter of 1873; Special Laws of 1873, p.——.) Again, it is said in another section of the charter: "The council shall have power to pass, publish, amend or repeal all ordinances, rules and police regulations *not contrary to the constitution and laws of this State*," etc. (Printed Charter and Ordinances, p. 24, sec. 43.)

Referring, then, to the laws of the State above mentioned, it will be seen that it was imperatively required: 1, The bonds shall specify the purpose for which they were issued; 2, They shall be registered with the Comptroller; and, 3, The Comptroller is required "to endorse on *each bond* so registered his certificate of registration."

None of these requirements were complied with by defendant in the issuance of the bonds in suit, and there is *an absence of recitals in the bonds either that compliance was had therewith, or that they were issued pursuant to and in compliance with the constitution and laws of the State.* Here we are dealing with and treating of bonds containing no recitals, save a reference to the ordinance under which they were issued; and hence the plaintiff is not in a position to invoke that line of decisions which hold that proper recitals cure mere *irregularities* in the proceedings had preliminary to the issuance of municipal bonds. (Hopper v. Covington, 118 U. S., 150.) It, however, cannot, in any event, invoke that rule in this case, for the objections to the bonds urged are not irregularities merely pertaining to the proceedings preliminary to their issuance, but are objections founded in the statute which requires certain things to be done as a prerequisite to the issuance of a perfect bond. Upon this point this court, in *Merchants' Bank v. Bergen County*, says: "Unless, therefore, there is something in connection with their issue to estop the Board from contesting their validity, they can in no manner bind the county. This is not a case where there existed in the Board a general power to issue negotiable securities of the county so that parties would be justified in taking them when properly executed in form by its officers. It is a case where there was no power except as specially delegated by law for a particular purpose. All persons taking securities of municipalities having only such special power, must see to it that the condition prescribed for the exercise of the power existed. As an essential preliminary to protection, as a *bona fide* holder, authority to issue them must appear. If such authority did not exist, the doctrine of protection to a *bona fide* purchaser has no application."

"In the bonds of Bergen county there are no recitals. The bank, in taking them, was bound to ascertain whether or not they were authorized. Had it examined the register of the bonds issued to take up the matured bonds, which was a public record of the county and open to inspection, it would have learned that the bonds which it received were not of the number thus authorized. Content to rely upon

the unsupported representations of Bogert, it can not now cast upon the county the consequences of its own mistake." (115 U. S., 391, 392.)

The cases of Township of Oakland v. Skinner, 94 U. S., 358; Jasper county v. Anthony, 101 U. S., 696, 698; Dixon county v. Fields, 111 U. S., 85; and, 118 U. S., 150 are to the same effect.

In this connection the fact is also adverted to that the *real purpose* of the issue of these bonds, as abundantly disclosed by the record, was an illegal and prohibited purpose —aid to the Gulf, Colorado & Santa Fe Railway Company, in the purchase for and donation to it of right of way through and depot grounds in the city—and that the greater part of the proceeds arising from their sale was so appropriated and diverted. (See Bill of Exceptions No. 3, Rec. 23-37; in particular, see Rec. 29, 30, 31, 32.) Cleburne v. Railway Co., 66 Texas, 460; Art. 11, Sec. 3, Cons., 1876. Defendant asked appropriate instructions as to this issue, which were refused and bill saved. (See Instructions Nos. 1 and 2, and charge of court *supra*; Rec. 45.)

## III.

No authority—power—to issue and sell, in open market, existing at the time when the power was sought to be exercised, no person purchasing said bonds, no matter when or under what circumstances, can be protected; and no act of the city or its officials can operate as an estoppel against it. (New Orleans vs. Clark, 95 U. S., 652; Buchanan v. Litchfield, 102 U. S., 287; Dixon v. Field. 111 U. S., 92; 121 U. S., 166; 118 Ib., 150; 20 Wall, 667; 108 U. S., 287.)

When the debt as here is void in its inception for want of authority to create it, no subsequent ratification of it *by the collection of taxes or otherwise* can give it any validity, nor can there be such a thing as a *bona fide* holder of the obligations with a right to collect them notwithstanding the want of power in the city to create the debt (78 Tex., 455, 456, 457). To the same effect are the decisions of this court. (Davies County v. Dickinson, 117 U. S., 657; Hays v. Holley Springs, 114 U. S., 120; Merrill v. Monticello, 138 U. S., 682; Buchanan

v. Litchfield, 102 U. S., 278; East Oakland v. Skinner, 94 U. S., 255; Marsh v. Portland Co., 10 Wal., 676.)

Peremptory constitutional provisions that municipalities *shall not issue bonds*, exceeding a specified percentage on the value of the taxable property within the municipality, to be ascertained by the official assessments or valuations for the purposes of taxation, are regarded by the Supreme Court of the United States, as well as by the State tribunals, as fixing a limit beyond which the power to issue bonds cannot be legislatively conferred, and the Supreme Court holds, that, if bonds be issued in excess of such limit, they are void in the hands of *bona fide* holders, notwithstanding *a recital therein* that they are issued *under and in pursuance of the constitution of the State*, inasmuch as such recital will not estop the municipality from showing that the bonds were issued *in violation of the constitutional limitation*; and, if this be shown, the plaintiff cannot recover, though he be a holder for value and without actual notice of any over-issue. (1 Dill. on Mun. Corp., 4th ed., sec. 529a).

A purchaser of municipal bonds is bound to take notice of any provisions of the constitution or legislation of the State relating to the power of the municipality to issue them; and, if the act conferring the power is in conflict with the constitution, the bonds are void, even in the hands of a *bona fide* holder for value. And the purchaser must also notice the provisions and extent of the legislative enactments on the subject. (1 Dill. on Mun. Corp., 4th ed., sec. 542).

## IV.

That plaintiff, or other holder of these bonds, may have a remedy against the defendant other than an action on the bonds is, at least questionable. (Hackettstown v. Swaekhamer, 37 N. J., L., 191; Mayor v. Ray, 19 Wall., 468, 480; 1 Dill. on Mun. Corp., 4th Ed., note to section 127, and note 1 to Sec 122, pp. 187, 188.) But that question cannot arise here, and it is submitted that a recovery in this action cannot be sustained.

The second and third assignment of error, (*supra*) questioning the correctness of the rulings of the circuit court in

1. Litchfield v. Ballou, 114 U. S. 190.

excluding in the one instance and admitting in the other proffered testimony, are not waived; but, in view of what has already been said herein, are submitted without elaboration.

It is respectfully submitted that, as was done in 130 U. S., 662, the judgment should be reversed and the cause remanded with directions to render judgment for the defendant.

S. R. FISHER,
Counsel for Plaintiff in Error.

FILED.
NOV 24 1891
JAMES H. McKENNEY

# In Supreme Court of the United States.

OCTOBER TERM, 1891.

NO. 120.

THE CITY OF BRENHAM, PLAINTIFF IN ERROR,

*vs.*

THE GERMAN-AMERICAN BANK, DEFENDANT IN ERROR.

*In Error to the Circuit Court of the United States for the Western District of Texas.*

BRIEF FOR DEFENDANT IN ERROR.

HENRY SAYLES,
Counsel for Defendant in Error.

ABILENE PRINTING COMPANY, ABILENE, TEX.

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BRIEF FOR DEFENDANT IN ERROR.

## STATEMENT OF THE CASE.

This suit was brought by defendant in error, to recover the amount of interest due on certain bonds, issued by the plaintiff in error, and evidenced by the over-due coupons attached to the bonds. Judgment was rendered in favor of the defendant in error for the amount of interest due and unpaid.

The questions presented by the record are:

**1st. Did the city of Brenham on the 7th of June, 1879, have authority under the constitution and laws of Texas to contract a debt of fifteen thousand dollars for general purposes.**

**2nd. Did the city of Brenham under its charter, have the authority to issue negotia-**

**ble interest bearing bonds on the 7th of June, 1879, to borrow money on the credit of said city for general purposes.**

**3rd. If the preceding questions are answered in the affirmative, then are such bonds so issued and in the hands of a purchaser for value and without notice, void, on the ground that there is a variance between the ordinance and the bonds, in this: that the ordinance provides for the issuance of bonds payable in twenty years, and redeemable at the pleasure of the city after five years, and those issued are payable in twenty years, but not redeemable till after the expiration of ten years.**

The defendant in error in support of the judgment of the court, relies upon the following propositions:

I.

**The city of Brenham had authority on the 7th of June, 1879, to authorize the execution and delivery of its coupon bonds, negotiable and payable twenty years after date, for the purpose of borrowing money for general purposes.**

It was proven that the city of Brenham acts, and since 1873 has acted, under a special charter granted it in that year by the legislature of the state, which charter is a general law of the state of Texas. (See special acts 13 Legislature.) The charter of the city of Brenham provides: Art. 1. That all the inhabitants of the city of Brenham shall continue to be a body politic and corporate, with perpetual succession by the name and style of the city of Brenham; and as such they and their suc-

cessors by that name shall have, exercise and enjoy all the rights and immunities, powers, privileges and franchises now possessed and enjoyed by said city, and herein granted and conferred, and shall be subject to all the duties and obligations now pertaining to or incumbent on said city, as a corporation, and may ordain and establish such acts, laws, regulations and ordinances not inconsistent with the constitution and laws of this state, or of the United States, as shall be needful for the government, interest, welfare and good order of said body politic. And under the same name shall be known in law, and be capable of contracting, being contracted with; * * * * * May take, hold and purchase, lease, grant and convey such real and personal or mixed property or estate as the purposes of the corporation may require, within or without the limits thereof, and may make, have and use a corporate seal and change and renew the same at pleasure.

The city council shall have the management and control of the finances and other property, real, personal and mixed, belonging to the corporation, and shall likewise have the power to appropriate money, and to provide for the payment of debts and expenses of the city.

**The city council shall have the power and authority to borrow, for general purposes, not exceeding fifteen thousand dollars, on the credit of the city.—Art. 3..**

The general powers of the city, among others enumerated, are, to provide the city with water; to make, regulate and establish public wells, pumps and cisterns, hydrants and resevoirs, in the streets or elsewhere within said city, or beyond the limits thereof, for the extin-

guishment of fires and the convenience of the inhabitants, and to prevent the unnecessary waste of water. To have the exclusive control and power over the streets, alleys and public grounds and highways of the city, and to abate and remove encroachments or obstructions thereon; to open, alter, widen, extend, establish, regulate, clean or otherwise improve the same; to put drains and sewers therein, etc.; to establish, erect, construct, regulate and keep in repair bridges, culverts, and sewers, etc.; to establish and erect markets and market houses; to provide for the enclosing, regulating and improving of all public grounds and cemeteries belonging to the city, and to direct and regulate the planting and preserving of ornamental and shade trees in the streets, sidewalks or public grounds; to establish and regulate public pounds; to purchase, establish and regulate one or more cemeteries; to take and condemn land and real estate in said city to the public use, viz: for streets, alleys, and public ways; for extending, straightening and widening those streets now in use; for public squares, parks and pleasure grounds.

Art. 24 reads as follows: This act shall be deemed a public act, and may be read in evidence without proof, and judicial notice shall be taken thereof in all courts and places.

The provisions of the charter of the city of Brenham above set forth, clearly show that it was contemplated by the granting power, that said city should have the right to make extensive improvements for the benefit of the citizens thereof, requiring large outlays of money. It seems clear that it was also contemplated that such improvements should not be paid for out of the

current revenues received from taxation, but that the credit of the city might be used for such purposes. It is provided in Sec. 2 of the charter of the city of Brenham **"That the city council shall have power and authority to borrow for general purposes, not exceeding fifteen thousand ($15,000) dollars on the credit of the city.** Transcript p. 23.

**We maintain that the express power granted to the city of Brenham by its charter, carried with it the power to issue bonds for the amount so borrowed.**

This is not only true as a general proposition of law, but is peculiarly true of the city of Brenham, for it would have been impossible for said city to have made the improvements authorized by its charter, without the exercise of the charter authority to borrow money. The city of Brenham having the express authority to borrow money for general purposes on the credit of the city, certainly through its proper officers could have executed a negotiable promissory note for the money so borrowed. If this be conceded, then it is likewise true that said city of Brenham could have issued its negotiable coupon bonds for money borrowed for general purposes. Mr. Chief Justice Waite, in the case of New Providence vs. Halsey 117 U. S. 337, cites the case of Ackley School District vs. Hall 119 U. S. 135, wherein it is stated that a municipal bond in the ordinary form is a promissory note negotiable by the law merchant, within the meaning of the act of March 3. 1875.

The supreme court of the United States has repeatedly held, **that the power to borrow money carries with it the power to issue bonds.** Rogers vs. Burlington, 3 Wallace 654; Seybert vs. Pitts-

burg, 1 Wallace 372; Mitchell vs. Burlington, 4 Wallace 270.

It makes no difference, as said by Mr. Justice Clifford in the case of Rogers vs. Burlington above cited, whether the bonds as issued by the defendant (the city of Burlington) were sold in the market by their officers, or were first delivered to the company, and were by their agents sold for the same purpose. * * Technically speaking, it may be said that the transaction, as between the company and the defendants was, in form, a contract of lending, but as between the defendants and the persons who purchased the bonds in the market, it was undeniably a contract of borrowing money; and the same remark applies to this transaction in its practical and legal effect upon all subsequent holders of the securities, who have since become such for value, and in the usual course of business. Rogers vs. Burlington, 3 Wallace p. 667.

The supreme court of Texas in Dwyer vs. Hackworth 57 Texas 245, involving the validity of a tax levied to pay interest and provide a sinking fund on the bonds of the city, say: "It appears from the agreed statement of facts set out therein, that the city of Brenham, under its charter, had authority to borrow money for general purposes, **and did so borrow, by selling its bonds,** to the amount of $15,000." Counsel of plaintiff in error (in his brief, p. 23), seeks to weaken the force of this expression by the statement that the validity of these bonds was not in question in that suit. But it is a fact shown by the record in the present case, that the charter did authorize the city to borrow money, and that the city did borrow

money by selling its bonds, and the court held that the tax levied for paying interest and to provide a sinking fund was a legitimate tax and within the power of the city to impose. Mr. Dillon says that an "express power to a municipal corporation to borrow money includes the power to issue its negotiable bonds, or other usual securities." Municipal Corporations, Ch. VI, § 83. In Seybert vs. City of Pittsburg, 1 Wallace 272, it was held that where a city had authority to subscribe to the stock of a railway company, "as fully as any individual," it had authority to issue its negotiable bonds in payment of the subscription. The cases cited by plaintiff in error in his brief do not controvert or bring in question the proposition relied upon by defendant in error, that a corporation with **express power** to borrow money may exercise that power by the issuance bonds, but maintains an entirely different proposition, to-wit: that a municipal corporation, under an **implied** power to borrow money for municipal purposes in payment of its current expenses cannot borrow money and give therefor a negotiable security freed from equities that may be set up by the makers.

We will now review some of the authorities relied on by the plaintiff in error in support of its proposition, that the city of Brenham did not have authority under its charter to issue negotiable bonds: The case of Merrell vs. Montecello, 138 U. S. p. 673, is cited by plaintiff in error in his brief p. 18, as authority for denying the right of the city of Brenham to issue negotiable bonds, under the power conferred to borrow, for general purposes, not exceeding fifteen thousand dollars, on the credit of the city. In this case the statutes of Indiana

authorized towns to issue bonds for the purchase of lands and the erection of buildings for school purposes only. The bonds in suit were not issued for either of the purposes named, but were issued in May, 1878, to pay off bonds issued in May, 1869. The act which authorized the issue of bonds in 1869, required provisions for their payment to be made by the levy of a tax sufficient to pay the annual interest with an addition of not less than five cents on the one hundred dollars to create a sinking fund for the liquidation of the principal. The law of 1869 also prescribed the mode and time within which the bonds issued by its authority should be paid. The law of 1878 limited the authority to issue bonds to a particular purpose. Having provided the mode in which they should be paid, the city had no authority to issue bonds for that purpose, and on the contrary, the bonds authorized by the act of May, 1878, were limited to another purpose distinctly expressed. The question decided in this case is tersely stated in the syllabus as follows: "The **implied** power of a municipal corporation to borrow money to enable it to execute the powers expressly conferred upon it by law, if it exists at all, does not authorize it to create and issue negotiable securities to be sold in the market and to be taken by the purchaser freed from equities, which might be set up by the maker."

This case seems to be relied on above all others by the plaintiff in error in support of its main proposition, that the city of Brenham had no authority to issue bonds. The facts of this case differ widely from the facts of the Brenham case. In the Montecello case the general statutes of the state forbade the issuance of bonds by a

municipal corporation, such as Montecello is, except for the **purpose of buying grounds and building school houses thereon.** It was affirmatively shown that the bonds in question were not issued for either of these purposes, but for a purpose, that the general laws of the state, forbid the issuance of bonds for.

In the Brenham case it is shown that the city had authority to incur debts for many different general purposes, and that it had the **express** authority to borrow money on the credit of the city for general purposes, not to exceed fifteen thousand dollars.

There is an ordinance of the city of Brenham dated June 7, 1879, (Transcript p. 24) that authorized the issuance of fifteen thousand dollars of the bonds of said city for general purposes. The bonds were issued for general purposes as shown by the face of the bonds, (Transcript p. 26) and the same were sold by the proper officers of the city of Brenham and the proceeds thereof turned over to the city of Brenham.

There are other cases cited by Plaintiff in er or on the question, that the city of Brenham had no authority under its charter to issue bonds. We do not believe the cases to be pertinent to the issue involved in this case, but we beg to comment on these cases, and state them as follows:

In Claiborne county vs. Brooks, 111, U. S. 400, the statute made it a duty of the county court to errect a court house, jail and other public buildings, for which purpose a special levy of taxes could be made. A county had no express authority to issue bonds to provide a fund for the above purpose. It was held that the authority to erect a court house did not authorize the

issuance of commercial paper as evidence or security for a debt contracted for that purpose.

In Mayer vs. Ray, 19, Wall 468, the city of Nashville issued checks in form negotiable drawn by the mayor and recorder of the city on the city treasurer. These checks were presented to the city treasurer and by him indorsed with his name and the date of his indorsement. They were then taken by the holder and were paid to the treasurer of the board of education of the city in discharge of school taxes. This officer then sold the checks and with the money discharged the salaries due by the city to the teachers of its public schools.

It was shown in evidence that the charter of the city did not confer express power to borrow money, and it was held that these checks were not commercial paper and that the holder took them subject to legal and equitable defences.

The majority of the court held that the power to borrow money does not belong to a municipal corporation as an incident of its creation. To be possessed it must be conferred by legislation, either express or implied.

In Police Jury vs. Britton, 15, Wall, 566, the law of Louisiana authorized the police jury to levy and collect a tax for levee purposes and to pay for work when finished by a warrant, payable to the contractor, which shall be a legal order upon the treasurer of the levee fund for the amount therein specified. To fund the debt contracted for levee purposes, the police jury issued coupon bonds payable to bearer, six years after date, or sooner, at the pleasure of the Parish.

It was held that the law above stated prescribed the manner in which payment for the work should be made, and the Parish had no implied authority to issue negotiable securities therefor.

II.

**The city of Brenham is not subject to the condition imposed by the constitution of 1876, requiring the levy of a tax sufficient to pay the current interest and to create a sinking fund of at least two per cent. thereon.**

It is stated in the petition that the city of Brenham is a municipal corporation duly chartered and incorporated by and under its charter, approved February 4, 1873. (Tran. p. 1.)

The answer of the defendant alleges that the city of Brenham is a municipal corporation of less than ten thousand inhabitants, incorporated on the 4th day of February, 1873, under the constitution and laws of Texas, with powers and privileges limited and restricted by the law of its immediate creation and the constitution of the state. (Tran. p. 6.)

It was proven that the city acts, and since 1873 has acted, under a special charter granted it in that year, and that said charter contains, among others, the following provision, under which the power to issue the bonds hereinafter referred to, is claimed: Sec. 2. That the city council shall have the power and authority to borrow, for general purposes, not exceeding fifteen thousand ($15,000) dollars on the credit of the said city. (Tran. p. 23.)

Sec. 4, 5, Art. 11 of the constitution of 1876, reads as follows: Sec. 4. Cities and towns having a population of ten thousand inhabitants or less, may be chartered alone by general law. They may levy, assess and collect an annual tax to defray the current expenses of their local government; but such tax shall never exceed, for any one year, one-fourth of one per cent, and shall be collectable only in current money. * * *

Sec. 5. Cities having more than ten thousand inhabitants may have their charter granted or amended by a special act of the Legislature, and may levy, assess and collect such taxes as may be authorized by law, but no tax for any purpose shall ever be lawful, for any one year, which shall exceed two and one-half per cent of the taxable property of such city; and no debt shall ever be created by any city, unless at the same time provision be made to assess and collect annually a sufficient sum to pay the interest thereon and create a sinking fund of at least two per cent thereon.

Sec. 7, Art. 11. All counties and cities bordering on the coast of the Gulf of Mexico are hereby authorized upon a vote of two-thirds of the tax payers therein (to be ascertained as may be provided by law) to levy and collect such tax for construction of sea walls, breakwaters or sanitary purposes as may be authorized by law, and may create a debt for such works and issue bonds in evidence thereof. But no debt for any purpose shall ever be incurred in any manner by any city or county unless provision is made at the time of creating the same for levying and collecting a sufficient tax to pay the interest thereon and provide at least two per cent as a sinking fund, and the condemnation of the

right-of-way for the erection of such works shall be fully provided for.

The cities referred to in the constitution are cities chartered by general law, and cities of over ten thousand inhabitants with charters granted or amended by special acts of the Legislature, and cities bordering on the Gulf of Mexico.

Cities having less than ten thousand inhabitants were permitted to accept the provisions of the general law relating to the incorporation of cities, and when the proper evidence of such acceptance is filed in the office of the County Clerk, the provisions of the general law applied to such city, "and all acts theretofore passed incorporating such city, which may be in force by virtue of any existing charter, shall be repealed from and after the filing of the said copy of these proceedings as aforesaid." (Revised statutes, Art. 349, Ed. of 1879.)

The amendment of April 6, 1881, 17 Leg., p. 115, contains substantially the same provisions. But the city of Brenham has not accepted the provisions of the statute, and has continued to exercise the power granted by its special charter. The charter grant of power to the city of Brenham to borrow fifteen thousand dollars for general purposes, is not in terms limited by the constitution of this state, and these limitations or conditions have not been applied by the Supreme Court of this state to any city which was by its special charter granted before the adoption of the constitution of 1876, specially empowered to borrow a specified sum of money. The following cases are referred to by the plaintiff in error and we beg to review them too: In Waxahachie vs. Brown, 67 T. 519, the town of Waxahachie was in-

corporated by a special act of the Legislature, April 28, 1871. That act did not confer upon the town the right to borrow money. In 1884 the town accepted the provisions of the act of 1879, authorizing it to take exclusive control of public schools. It was held that its power after that date to borrow money was subject to the general provisions of the constitution and statutes relating thereto.

In Gould vs. city of Paris, 68 T. 511, it does not appear when or how the city of Paris was incorporated, or what were the powers conferred upon it. The debt was contracted February 10, 1877, and presumably its authority to contract debts was derived from the constitution and laws then in force.

In city of Terrell vs. Dessaint, 71 T. 770, and Citizens National Bank vs. city of Terrell, 78 T. 450, the debts were contracted in 1883 and 1885. There was no evidence that the city of Terrell had under a charter granted prior to the adoption of the constitution, power to borrow money.

It is said by Mr. Cooley that a constitution should operate prospectively only, unless the words employed show a clear intention that it should have a retrospective effect. (Constitutional Limitations.)

We do not belive that it was intended by the framers of the constitution to affect the power granted by special charter to the city of Brenham by the Legislature, by imposing the conditions upon the charter claimed by the plaintiff in error. It seems clear to us that it was the intention of the framers of the constitution not to interfere with cities acting under special charters theretofore granted. In our judgment the limitations claimed

by the plaintiff in error apply only to the class of cities named in the particular article, in which such limitation is fixed.

But should it be held that the limitations of the constitution of 1876 apply to the city of Brenham, then we submit.

III.

**That the debt contracted by the city of Brenham, by the issuance of its bonds to the amount of fifteen thousand dollars, is within the limitations prescribed, by the constitution of 1876.**

**That the city of Brenham having the power to issued said bonds, it is to be presumed in an action of debt against the city by an innocent holder of said bonds, that said bonds were regularly issued and in compliance with the requirements of the law.**

On the question of the power of cities to issue bonds, the Supreme Court of Texas in the case of the Citizens Bank vs. the city of Terrell, 78 T. 457, says: "The constitution in effect commands that a city with less than 10,000 inhabitants shall, in order to create a debt, take its latest assessment of property for taxes and from that ascertain how much money a tax of 25 cents on $100 of valuation will produce, and it may create a debt, that that amount will provide for the payment of the interest on and 2 per cent. per annum additional."

While the language of the Supreme Court of Texas, in the case referred to, is general, yet the facts show that the particular city referred to was one incorporated under the general laws of Texas after the adoption of

the constitution of 1876, containing the restrictive clause referred to. But it cannot be maintained that the city of Brenham's rights and powers, under its special charter, are less than the rights and powers of cities operating under the general laws of Texas.

And it is only fair to concede, that if the test of the amount of bonds that cities acting under the provisions of the general laws, could issue, has been correctly stated by the Supreme Court of Texas, then it must be admitted. that the city of Brenham is not affected by any rule more onerous than this.

It affirmatively appears from the record, that the taxable values of the city of Brenham at the date of the issuance of the bonds, based on its last assessment of property for taxes, **was more than sufficient to provide a fund to pay the interest and create the sinking fund,** as tested by the rule laid down by the Supreme Court of Texas.

The assessed valuation of the property of the city of Brenham as shown by the latest assessment preceeding the issuanceof the bonds was $1,050,000

| | |
|---|---|
| Tax of 25 cents on the $100 yields | 2,625 |
| Int. on debt 10 per cent per annum | 1,500 |
| Sinking fund 2 " " " " $300 | |
| Total | 1.800 |
| Excess of tax over and above interest and sinking fund #825.00 | $699.00 |

Record p. 27.

The plaintiff in error arrives at a different result by adding the current expenses of the city to the interest and sinking fund, making the aggregate expenses of the city to amount to $4,590. But the constitution does not

require that payment of the current expenses of the city out of the property tax should also be provided for. The city has other sources of revenue than the tax on property

The city of Brenham had authority to levy an occupation or license tax upon every trade, profession, calling or other business, amounting to thirty different callings or pursuits. See act of Feb. 4, 1873.

The record in this case (p. 27) shows that these taxes amounted for the year 1879, to the sum of $1965.

In the case of Gelpcke vs. City of Dubuque, 1 Wallace 175, it is held when a corporation has power to issue negotiable securities, a bona fide holder has a right to presume that they were issued under circumstances which gave the authority, and they cannot be impeached for any infirmity.

In the case of Bissell vs the city of Jefferson 24 Howard 287 it is said: Where bonds recite that they were issued pursuant to law, it cannot be set up against a bona fide holder that the taxable value of the property of the township, was not sufficient to authorize the bonds to the amount for which they were issued.

It must be admitted that the defendant in error, is a bona fide holder for value and before maturity of the coupons sued on. Neither can it be disputed that the city of Brenham had taxable values sufficient at the date of the issuance of the bonds to have justified the creation of the whole bonded indebtedness, then created by the city of Brenham. It is therefore not necessary for this court to go to the full length, of the rule laid down, in the case of Bissell vs. the city of Jefferson cited above.

IV.

**The city of Brenham having authority**

**under its charter to borrow money and issue negotiable bonds therefor, and it appearing in evidence that its taxable values were sufficient to authorize the issuance of bonds to the amount of $15,000, as permitted by its charter, the fact, (if such be the fact) that no provision was made for the levy and collection of an annual tax for the payment of the interest and sinking fund, is a matter of defence to an action on the coupons of the bonds by a holder for value.**

The plaintiff in error urges as a ground of reversal, that it was not affirmatively shown by defendant in error, that provision for the payment of the debt incurred was made by the levy of a tax therefor, before the issuance of the bonds.

It is a sufficient answer to this proposition that a tax of one-fourth of one per cent on the valuation of the taxable property of the city of Brenham, as shown by its last assessment roll, was sufficient to pay the current interest and create a sinking fund as required by law, and the presumption exists that at or before the time the bonds were issued, provision was made for the payment of the debt as required by the constitution, if the constitution did require it, and the burden of allegation and proof rests upon the defendant in ~~error~~ court below to rebut said presumption.

This presumption is supported by Sec. 7 of the ordinance relating to the issuance of the bonds in question, (Transcript 24.) It authorizes the printing and negotiation of the bonds, and **appropriates** out of the general ad-valorem tax of the city one eighth of one per cent. to pay the interest and sinking fund on the bonds, the same to be kept separate from the other funds of the

city and to be used for no other purpose.

The ordinance authorizing the issue of bonds was adopted and took effect June 7, 1879. (Transcript q. 25.) The bonds were issued July 31, 1879, and the interest was payable semi-annually, on the first days of September and March. (Transcript p. 14.)

Under the general laws of this state then in force the assesment of taxes was made between the first day of January and the first day of June of each year, and it may be presumed in support of the action of the city council that the assesment roll for the year 1879 was before them, and that after appropriating out of the amount thus assessed sufficient to pay the first coupons, provision was also made to assessand collect annually a tax sufficient for the payment of the interest and sinking fund as required by law.

This presumption is supported by the general charge of the court to the jury. The court after stating the facts in evidence, including the ordinance authorizing the issuance of bonds, uses the following language: "I charge you that the ordinance read for you, **in connection with other ordinances that I shall not read to you,** shows a substantial and sufficient compliance with the law, and on this defense you will find for the plaintiff (Transcript p. 20.) No exception to the statement of the facts in this charge is found in the record.

The presumption exists in favor of the holders of the bonds for value, and without notice that there has been a substantial compliance with all of the requirements of the law, and in this respect there is no difference between public and private corporations.

In Royal British Bank vs. Turquand, 5 Ellis and

Blackburn, 259, (85 Eng. Common Law Reports 246) the action was based on the bonds of a joint stock company; signed by two directors under the seal of the company. It was objected to the bonds that the directors had no authority to borrow money on bonds unless thereto authorized by a resolution of the Board. It was held that the production of the bond made a **prima facie** case for the plaintiff, and that it was incumbent on the defendant to show that the bond was unlawful and void

This case is cited with approval in St. Joseph Township vs. Rogers, 16 Wallace, 644, when it was held that the recital in the bond executed by a municipal corporation of a fact within the jurisdiction of the officer issueing it, to determine, was conclusive in favor of a holder for value and without notice.

In Gelpcke vs. city of Dubuque, 1, Wall 175; Moran vs Miami county, 2 Black 725; Supervisors vs. Shenck 5 Wall, 784; Mayer vs. Lord, 9 Wall 414; City of Lexington vs. Butler, 14 Wall 296; it is held that when a corporation has power to issue, negotiable securities, the **bona fide holder has a right to presume they were issued under the circumstances which gave the requisite authority.**

In commissioners of Knox county vs. Aspinwall 21 How, 539, the state authorized county commissioners to subscribe for railroad stock and issue bonds therefor, in case a majority of the voters of the county should so determine after a certain notice should be given of the time and place of the election, and the board subscribed for the stock and issued the bonds, purporting to act in compliance with the statute. If was held too late in a suit on the coupons of the bonds so issued to call in

question the existence or regularity of the notices in a suit against them by the holders of the coupons, who were innocent holders.

The presumption that the election which gave authority to issue the bonds was legally held, was conclusive in favor of such holders.

In Marcy vs. Township of Oswego, 92, U. S. 637, the action was on coupons attached to bonds issued by the township of Oswego under an act of the legislature of Kansas limiting their issue to an amount not above such a sum as would require a levy of more than one per cent per annum on the taxable property of such townships to pay the yearly interest. There was no recital in the bond as to the value of the taxable property and therefore the question of of **estoppel** did not exist.

It was held that the officers designated to execute the bonds were invested with power to decide whether the contingency had happened, or whether the fact existed which was a necessary precedent to any subscription or issue of bonds, and their decision was not conclusive in a suit by the **bona fide** holder of the bonds that the requirements of the legislative act had been complied with, ~~is conclusive~~; and this is more emphatically true when the fact is one peculiarly within the knowledge of the persons to whom the power to issue the bonds had been conditionally granted, and see County of Clay vs. Society for Savings, 104 U. S. 579, in which it is held that in a suit between a municipal corporation and the **bona fide** holder of its bonds regular upon their face, they are **prima facie** evidence of the regularity of everything requisite for the proper issuance of such bonds.

In Humbolt Township vs. Long 102, U. S. 642, the decision in Marcy vs. Township of Oswego is adhered to. In the former case (102 U. S. 642) it appears that the assessment rolls were offered to show that the bonds were invalid by reason of their having been voted and issued in excess of the statutory limit, and it was held that this fact could not be set up against a **bona fide** holder of the bonds, in face of the decision of the board and their recital that the bonds were issued persuant to and in accordance with the act of 1879.

In the case at bar the bond recites that it is **authorized** by ordinance of the city of Brenham approved June 7, 1879, and it is presumed that the law permiting the issuance of the bonds under the ordinance was complied with. If the position of plaintiff in error is correct, then to authorize the issuance of the bonds there must have been a cotemporaneous or prior ordinance providing for the levy of a tax, and in the absence of proof to the contrary, the presumption exists that the directions of the statute had been complied with and that the officers of this city had done their duty in the premises.

In Gould vs. City of Paris, 68, T. 511, and City of Terrell vs. Dessaint, 71 T. 770, cited on page 30 of the brief of plaintiff in error, it is shown affirmatively that the requirements of the constitution and laws had not been complied with. In Citizens bank vs. City of Terrell 78, T. 450, the bonds were held valid for the amount authorized by the taxable values.

In Gould vs. City of Paris 68, T. 511, the following facts appear. Paris was a city of less than 10,000 inhabitants. It not appearing to have a special charter prior to 1876 it is to be presumed that its power of

taxation for general purposes was limited by the constitution of 1876 to twenty-five cents on the hundred dollars of valuation for current expenses. In 1877 the city contracted a debt, issuing eighteen bonds therefor, each for $250, due ten years after date, with eight per cent interest, payable annually. To provide for the payment of this debt the city levied a special annual tax of one-tenth of one per cent in addition to the twenty-five cents authorized by law on the assessed value of its taxable property, and specially stipulated in the ordinance that no part of twenty-five cents authorized by law should be used for the payment of the bonds and coupons. On the face of the ordinance creating the debt it appeared that the tax levied was **ultra vires** and no provision being made for the payment of the debt it was absolutely void.

In the City of Terrell vs Dessant 71, T. 770, the city council authorized the execution of the notes of the city payable in one and two years from their date. It was affirmatively shown that no provision was made for the payment of the interest and for the sinking fund. There was nothing in the record to show that the city of Terrell was acting under a special charter. The court held that the obligations were void, because it was affirmatively shown that no provision had been made for the payment of interest or for the sinking fund as required by the constitution of the state. The facts of this case are in no manner similar to the one at bar.

In San Antonio vs. Lane 35, T. 405, it is held by the supreme court of Texas that bonds and coupons attached issued by a municipal corporation are negotiable instruments transferable by delivery, and therefore a

**bona fide** holder cannot be held responsible for any misconduct or default of the parties issuing them, **for such holder may well presume that every condition precedent to their lawful issuance has been complied with by such parties.**

In Citizens Bank vs. City of Terrell 78, T. 450, the issuance of bonds was authorized by an ordinance of December 12, 1883, for the sum of $28,000 at the rate of seven per cent interest. The bonds were issued on the seventh of July, 1884. The assessed value of taxable property within the city was $749,363 for the year 1883, and was $908,976 for the year 1884. It was held that the ordinance of December 12, 1883, was valid for such an amount as a tax of twenty-five cents upon the hundred dollar valuation, according to the last taken assessment of the taxable values of the city would provide for. If the bonds were delivered at different dates those first delivered up to the amount of the debt that the city could lawfully create, should be paid, and the remainder of them should be treated as nullities, citing Davies county vs. Dickson, 117, U. S. 657. If all of the bonds under this ordinance were delivered at the same time so that none of them have priority over the others, the amount of valid debt should be distributed equally between said bonds, citing McPherson vs. Foster, 43, Iowa 72.

V.

**The resolution of the city council of Brenham which authorized the issuance of bonds provided that the city shall have the right to redeem said bonds at any time after**

**five years from date. The bonds issued were made redeemable in ten years, and it is objected by the plaintiff in error that they are void by reason of this variance.**

(Brief of plaintiff in error, p. 24.)

To this objection, defendant in error, replies: **that the error in respect to the time within which the bonds are redeemable is an irregularity which the obligor is estopped from asserting.**

1. The bond recites on its face that it is authorized by an ordinance of the City of Brenham, approved June 7, 1879. It may be presumed that there was another ordinance authorizing the bonds to be made payable as recited. There is no evidence to the contrary.

2. The bonds bear date of July 31, 1879. On the 18th of August, 1879, the mayor reported to the city council the sale of the bonds, stating to whom they were sold, and the amount realized from the sale. At that date bonds of the amount of $3,000 were deposited with Giddings & Giddings for safe keeping. (Transcript p. 31-33.) On the same day the blank coupons No. 1, which had been cut from the bonds **before** selling were ordered to be destroyed. (Transcript p. 33.)

3. By an ordinance of September 17, 1879, the sum of $10,000 realized from the sale of the bonds was appropriated for the purpose of opening a street, over which the right of way was granted to a railway, and for other purposes. (Transcipt pp. 33, 34 and 35.)

4. $3,000 of the bonds issued under the ordinance of June 7, 1879, were used by the city for fire department purposes. (Transcript p. 35.)

5. All the coupons on the bonds up to and includ-

ing September 1, 1882, were paid by the city of Brenham. (Transcript p. 37.)

6. On the 21st of March, 1884, the financial committee reported to the city council of Brenham its annual statement, showing its liabilities, bonds of 1879, to be $15,000, accrued interest $3,750.

7. It appears that the coupons of the bonds issued by the City of Brenham became the property of the defendant in error on the 12th day of June, 1884. (Transcript p. 26.)

In McCoy vs. Briant, 53, Cal. 247, cited in appellants brief p. 25, bonds were issued by the officers of a municipal corporation without any resolution authorizing them to do the act. It was held that bonds issued without the passing of a resolution authorizing the issue of any bonds were void.

On the contrary, in cases where the corporation was authorized to issue bonds, and bonds have been issued and the proceeds have been received and used by the corporation, the law interposes an estoppel, and will not permit the validity of the contract to be called in question. Argenti vs. City of San Francisco 16, Cal. 256.

In Supervisors vs. Schenck 5, Wallace 772, an objection to municipal bonds was made on the ground that the election by which the power to issue bonds was confirmed was ordered by the county court, and not by the supervisors of the county as required by law. It was held that the levy of a tax and payment of interest by the proper authorities validates the bonds in the hands of **bona fide** holders for value. "Judge Story said there was no maxim where it does not prejudice the rights

of strangers, better settled in reason and law than *Omnis ratehabitir retrotrahitur et mandato priori acequiperatur*, and it is equally well settled that the maxim is as applicable to corporations in matters of simple contracts as to other contracting parties. Questions of ratification most frequently arise in respect to the acts or omisions of agents, but the general rule is the same in all cases where the act done was one which it was competent for the party attempted to be charged to do. When the principal, upon a full knowledge of all the circumstances of the case, deliberately ratifies the acts, doings or omissions of his agent, he will be bound thereby as fully to all intents and purposes as if he had originally given him direct authority in the premises to the extent which such doings or omissions reach.

To the same effect is County of Clay vs. Society for Savings 104, U. S. 579, holding that the fact that taxes had been levied to pay interest, and interest had been paid for several years of itself covers irregularities in the issuance of bonds.

The ratification of the bonds by the city council of Brenham is shown by the following facts of record:

The ordinance of June 7, 1879, providing for the issuance of the bonds by section 6, authorized the mayor and finance committee of the city to negotiate the sale of the bonds as required. (Transcript p. 24.)

The bonds bear date July 31, 1879. (Transcript p. 48.)

On the 18th ot August, 1879, the mayor reported the sale of bonds of the face value of $12,000, of which $5,000 were sold to Mensing and $3,000 remained on hand.

Bonds of this issue were used by the city for fire department purposes. (Transcript p. 35 )

All the coupons on the bonds up to and including September 1st, 1882, were regularly paid. (Transcript p. 37.)

At a meeting of the city council March 21, 1884, the financial committee presented its annual statement showing among other things bonds of 1879, $15,000, accrued interest $3,750.

On the 21st of April, 1884, C. C. Garrett, Esq., city attorney and one of the aldermen of the city, wrote to Henry Sayles, Esq., one of the attorneys of defendent in error, stating that the city council recognized the validity of the bonds and will pay them. (Transcript p. 38 and 42.)

On the 4th of September 1875, Mensing bought from the plaintiff in error $5,000 of the bonds in issue at 95 cents on the dollar. August 10, 1880, and September 5, 1882, the remainder of the issue was purchased by him.

On June 12, 1884, he deposited with the bank of defendant in error, as collatteral security for a loan of $10,000 and future advances, $10,000 of the bonds inclusive of the bonds to which were attached the coupons upon which this suit is based, excepting three of the coupons deposited which were detached from bonds deposited with another party. (Transcript p. 26.)

## VI.

It is suggested by counsel for the plaintiff in error in his brief that Arts. 421 and 423 of the Revised Statutes requiring the registration of bonds by the comp-

troller, applies to the bonds, the subject matter of this suit, and while he does not insist that such is the case he bases an argument upon that assumption. (Brief p. 48.)

These articles are a part of Title 17, Revised Statutes relating to cities, towns and villages, which are incorporated under its provisions. Article 340 of this Title provides the mode in which cities may be incorporated and how incorporated cities may accept its provisions. Article 341 of this Title reads as follows: The provisions of this Title shall not apply to any city until such provisions have been accepted by the city council in accordance with the preceding article.

Brenham is a municipal corporation, incorporated on the 4th day of February, 1873, under the constitution and laws of Texas, with powers and privileges limited and restricted by the law of its immediate creation and the constitution of the state. (See plea in statement of plaintiff in error. Transcript pp. 8-9.)

Brenham was incorporated by a general law, Act of February 4, 1873. Its charter authorizes it to borrow money for general purposes and does not require the registration of its bonds. The provisions of Title 17 do not apply to bonds issued by the City of Brenham, as expressly declared in Art. 341 of the Revised Statutes.

It is not therefore necessary to discuss the effect of a non-compliance with the provisions of the Revised Statutes relating to the registration of bonds.

It is respectfully submited that the judgment of the lower court should be affirmed.

HENRY SAYLES,
Counsel for Defendant in Error.

IN THE

# Supreme Court of the United States.

OCTOBER TERM, 1891.

THE CITY OF BRENHAM, Plaintiff in Error,

*vs.*

THE GERMAN-AMERICAN BANK, Defendant in Error.

No. 120.

**In Error to the Circuit Court of the United States for the Western District of Texas.**

## ADDITIONAL BRIEF FOR DEFENDANT IN ERROR.

The defendant in error does not contend that the power to issue bonds comes alone from the authority conferred upon the city of Brenham by its charter to establish, erect, construct, regulate, and keep in repair bridges, culverts, and sewers, etc.; to establish and erect markets and market houses; to provide for the inclosing, regulating, and improving of all public grounds and cemeteries belonging to the city, and to direct and regulate the planting and preserving of ornamental and shade trees in the streets, sidewalks, or public grounds; to establish and regulate public pounds; to purchase, establish, and regulate one or more cemeteries; to take and condemn land and real estate in said city to the public use, viz., for streets, alleys, and public ways; for extend-

ing, straightening, and widening those streets now in use; for public squares, parks, and pleasure grounds, etc.

Charter City of Brenham, Special Laws, 1873.

But the charter of the city of Brenham goes further, and expressly authorizes the city council to borrow money. This clause of the charter reads as follows:

"The city council shall have the power and authority to borrow, for general purposes, not exceeding fifteen thousand dollars, on the credit of the city."—Art. 3.

In all the cases relied on by counsel representing the city of Brenham, in which the power to issue bonds have been denied, the authority to issue bonds was claimed from the *implied* authority to create a debt.

We need not contend that the power to borrow money belongs to a municipal corporation as an incident of its creation, but it is sufficient for this case to say, that the city of Brenham had express authority, under its charter, to borrow money on the credit of the city to the extent of fifteen thousand dollars.

We contend that in this case that the power to issue bonds necessarily follows the authority to create the debt.

Rogers *v.* Burlington, 3 Wallace, 654;
Seabert *v.* Pittsburg, 1 Wallace, 272;
Milner *v.* Pencola, 2 Woods, 632;
Portland Savings Bank *v.* Evansville, 25 Fed. Rep., 389;
Looney *v.* City of Galveston, 54 T., 517;
Lynd Co. *v.* Wenebargo, 16 Wallace, 6;
Dulon Municipal Corporations, 2 vol., 507;
Gause *v.* City of Clarksville, 5 Dill., 165;
Mayer *v.* Inman, 57 Ga., 320;
Vicksburg *v.* Lombard, 51 Miss., 111.

On the question of the power to issue bonds, the Supreme Court of Texas, in the case of Waxahachie *v.* Brown, 67 Tex., 519, say:

"The right of cities and towns having ten thousand inhabitants or less, to issue bonds, being neither granted nor prohibited, was evidently left to the intention of the legislature."

Afterwards, in the case of The Citizens Bank *v.* The City of Terrell, 78 T., 457, the Supreme Court of Texas say:

"The Constitution in effect commands that a city with less than 10,000 inhabitants shall, in order to create a debt, take its latest assessment of property for taxes and from that ascertain how much money a tax of 25 cents on $100 of valuation will produce, and it may create a debt, that that amount will provide for the payment of the interest on and 2 per cent. per annum additional."

In this case the right to issue bonds was recognized.

In the case of Dwyer *v.* Hochworth, 57 Tex., 250, which was an agreed case, involving the validity of a tax to pay the interest on the bonds involved in the suit, the Supreme Court of Texas say:

"It appears that the city of Brenham, under its charter, had authority to borrow money for general purposes, and did so borrow by selling its bonds to the amount of $15,000."

While it is not claimed that the decison of the Supreme Court of Texas in the Dwyer-Hochworth case is an authoritative decision of the validity of the bonds, yet we refer to it and the other Texas cases to show that the courts of Texas recognize the right of the municipal corporations of that State to issue bonds—and the Dwyer case is also authority for the position that the courts of Texas recognize the right of cities incorporated prior to the adoption of the existing State constitution to exercise the charter powers theretofore conferred.

All the authorities that have come to our attention maintain the proposition that the express authority to create a debt carries with it the necessary incident, the execution of an obligation, as the evidence of such indebtedness.

> Daniel on Negotiable Instruments, ed. 1891, vol. 2, p. 248, sec. 1527*a*, 4th clause, and authorities cited in note.

The usual evidence of indebtedness given by a municipal corporation is a bond.

> Authorities cited above.

To show the legislative intent, we beg to call the attention of the court to Art. VII, Sec. 1, of the charter of the city of Brenham, special laws of Texas, 1873, which reads as follows: "*Bonds of the city of Brenham shall not be subject to tax under this act.*" It seems clear to us that this clause of the charter of the city of Brenham, following as it does the other clause of this charter, giving the authority to create a debt, is conclusive of the fact that it was intended by the granting power that the city of Brenham should have the authority and exercise the right of issuing its bonds. This clause of the charter of the city of Brenham, exempting its bonds from taxation, is in connection with the other clauses of the charter making provision as to the character of property within the limits of the city that should be taxed.

We think that the controlling point in the case before the court is, *did the city of Brenham have the power to issue bonds for general purposes?* If this right is conceded, then it seems manifest that the bonds, issued within the limit, are binding on the city; and that this is certainly true after such bonds have passed from the city of Brenham into the hands of purchasers for value and before maturity.

It seems to us that the only defence against negotiable bonds in the hands of an innocent holder is the one of power to issue them. It is said in Murray *v.* Lardner, reported in 2 Wall., p. 160, that municipal bonds are negotiable paper, and a purchaser for value before maturity takes them free from any infirmity in their origin. We construe that to mean all other infirmities except those which go *to the power* to issue. A purchaser of negotiable securities from a *bona fide* holder for value before maturity takes them freed from all infirmities in their origin.

Stoddard *v.* Kimball, 6 Cush. (Mass.), 469;
Allaire *v.* Hartshorne, 1 Zab., 665;
Williams *v.* Smith, 2 Hill (N. Y.), 301;
Chicopee Bank *v.* Chapin, 8 Met. (Mass.), 40;
Lay *v.* Wissman, 36 Ia., 305.

Where bonds purport on their face to have been issued in pursuance of law, the holder is not required to inquire as to the regularity of their issue.

Davis *v.* Kendallville, 5 Biss., 280;
Marsey *v.* Township of Oswego, 2 Otto, 637;
Lynde *v.* The County, 16 Wall., 6;
Miller *v.* Town of Berlin, 13 Blatch., 245;
Milner *v.* City of Pencola, 2 Woods, 632;
Walnut *v.* Wade (13 Otto, 683).

A *bona fide* purchaser of city bonds has a right to regard the recitals in the bonds as true, and is not bound to look further.

San Antonio *v.* Mehaffy, 6 Otto, 312;
Pollard *v.* Pleasant Hill, 3 Dill., 195.

Where the mayor and recorder of a city issue its negotiable bonds, reciting a compliance with the law, it is too late to maintain in defense that the mayor and recorder acted without authority when the city is sued on the bonds by a *bona fide* holder.

Larned *v.* Burlington, 4 Wall., 275.

It is also contended by counsel for the city of Brenham that the power to issue bonds is limited by the constitution of Texas adopted in 1876, and that bonds issued in excess of the constitutional limitation would not be binding on the city. Without admitting that this proposition is correct, permit us to again call the attention of the court to the rule laid down by the Supreme Court of Texas as applicable to those cities that incorporate after the adoption of the constitution of 1876. The city of Brenham at most can only be subject to this rule. The constitution in effect commands that a city with less than 10,000 inhabitants shall in order to create a debt take its latest assessment of property for taxes, and from that ascertain how much money a tax of 25 cents on $100 of valuation will produce, and it may create a debt; that that amount will provide for the payment of the interest on and 2 per cent. per annum additional.

Bank *v.* Jewell, 78 Tex., 457.

The city of Brenham had less than ten thousand inhabitants, but more than five thousand; and if it be true that its charter granted in 1873 is limited by the constitution of the State adopted in 1876, then, applying the rule laid down by the Supreme Court of Texas, what basis have we for the bonds?

The assessed valuation of the property of the city of Brenham, as shown by the latest assessment preceding the issuance of the bonds, was $1,050,000.

| | | |
|---|---|---|
| Tax of 25 cents on the $100 yields | | $2,625 |
| Interest on $15,000 bonds at 10 per cent. per annum | $1,500 | |
| Two per cent. in addition | 300 | |
| Total | | $1,800 |
| Excesss of tax over and above the interest and sinking fund | | $825 |

Thus applying the limitation of the constitution, which is most beneficial to the city of Brenham, and denying the unrestricted exercise of the charter right to issue bonds, it is clear that at the time of the issuance of the bonds, June, 1879, that the city of Brenham had the *power* to *issue* the amount of bonds as contended by the German-American Bank, defendant in error.

We contend, then, that the power to issue the bonds having been shown, it is to be presumed, in an action by a holder for value and before maturity against the city, that the bonds were regularly issued, and that the city of Brenham is estopped from setting up as against such holder any equities or informalities.

A party taking municipal bonds in good faith has a right to presume that if the public agents issuing them had legal authority to act, that they had fully complied with the requirements of that authority, and in an action thereon the municipality can not be heard to object to the regularity of its own proceedings.

Mayer *v.* The City of Muscatine, 1 Wall., 384.

We presume that it will not be contended that the German-American Bank is not the holder for value and before maturity of the coupons sued on. It is true that $2,250 of the coupons were overdue when they left the hands of Mensing and came to the German bank, but it will not be disputed that these coupons were not due at the time Mensing bought them.

This question of good faith and want of notice was submitted to the jury, who found their verdict in favor of the bank. (See the general charge of the court, pp. 18 and 19, transcript.) Verdict of the jury (Trans., p. 20.)

But following out the argument, we maintain that if the power exists to issue bonds, that a *bona fide* holder has a right to presume that they were issued under circumstances which gave the authority, and they can not be impeached for any infirmity.

Gelpake *v.* City of Dubuque, 1 Wallace, 175.

Purchasers are not required to look further than the bond.

Knox Co. *v.* Aspinwall, 21 Howard, 539.

Bonds are good in the hands of innocent purchasers, although there may be defects which would have invalidated the bonds in a direct proceeding before the same passed into innocent hands.

Mercer Co. *v.* Hackett, 1 Wallace, 83;
Daniel on Negotiable Instruments, ed. 1891, sec. 1537, and authorities cited in note 1.

It is contended by counsel for the city of Brenham, that even if the charter gave the power to issue bonds, no sufficient provision was made for the payment of interest and to create a sinking fund.

To this proposition we might content ourselves on the authorities cited, by replying, that it was not necessary for a purchaser for value and before maturity to look to this; that it was the duty of the city council of Brenham to make provision for the interest and sinking fund; and that it is conclusively presumed that the city council did make such provision. We are referred to the ordinance that authorizes the bonds, and it is urged that this ordinance provides an inadequate amount. There is no evidence that this was the only ordinance, but on the contrary, the charge of the court bears out the presumption that there were other ordinances. For after calling the attention of the jury to the ordinance referred to, the court uses this language:

"I charge you that the ordinance read for you, in connection with the other ordinances that I shall not read to you, show a sufficient and substantial compliance with the law."

It may be significant to mention, that the record shows the sale in 1879 of only $12,000 of the bonds (Tr., pp. 31

and 32). The record does not show when the remaining $3,000 were put in circulation. The Mayor of Brenham shows by his report under date of August 18, 1879, that $3,000 of the Brenham bonds were placed with Gedding & Geddings for safe keeping (Tr., p. 31).

The mayor also shows by this report that the interest on the bonds sold ($12,000) had been paid to September 1, 1879. Only the interest for the next six months, maturing March 1, 1880, had to be provided for, the coupons maturing September 1, 1879, having been cut off (Tr., p. 33).

| | |
|---|---|
| Say six months interest on $12,000 at 10 per cent... | $600 |
| Two per cent sinking fund..... | 240 |
| Total ..... | $840 |

But we find (Tr., p. 27), that one-eighth of 1 per cent. on the last assessment roll, the amount of the tax levied, produced $1,312.50, leaving an excess of nearly $500.

It may be contended, however, that provision should have been made for the interest and sinking fund on the whole issue of the bonds, to which we reply that the record shows that it was sufficient for the first year, and it is to be presumed that it was also sufficient for subsequent years. The record shows that all the coupons on the bonds up to and including September 1, 1882, were paid (defendant's bill of exception No. 4, Tr., p 37), and it is to be presumed that such interest was lawfully paid.

In answer to the position that the revenues of the city of Brenham, from *ad valorem* taxes, was not sufficient to pay the current expenses and to provide a sinking fund for the interest on the bonds, we may well reply: The law no where requires the other expenses of the city to be first paid. Besides, the city of Brenham had other sources of revenue. It had the right in addition to the property tax to collect a poll tax, the right to collect oc-

cupation taxes, and it also had many other sources of revenue.

See Charter of the City of Brenham, Special Laws of Texas, 1873.

Replying to the minor points made by counsel for the city of Brenham, we contend—

That the variance between the bonds and the ordinance, as to the date when the city should have the right to redeem, is a mere irregularity that the city is prevented from asserting after the sale of her bonds.

In the case of Mygatt *v.* The City of Green Bay, 1 Biss., 292, it is held that a city is estopped as against a *bona fide* holder to allege that the recitals in the bonds as to the rate of interest do not correspond with the resolution of the board of trustees authorizing the subscription.

In the case of Luling *v.* City of Racine, 1 Biss., 314, a city was authorized to issue bonds payable in twenty years.

The bonds were issued in March, 1853, and made payable in February, 1873. *Held*, in a suit for interest, that an objection that the bonds were made payable in less than twenty years was not tenable; that the city put its own construction upon the act, issued its bonds, paid interest on them, and received certificates of stock, and it was therefore estopped from denying the validity of the bonds.

It should be borne in mind that this is not an action on the part of the city of Brenham to redeem her bonds, but an action of debt against it on the past-due interest coupons. In this action the city of Brenham should not be heard to deny the validity of the debt, because of the variance stated; we might admit that the city of Brenham could redeem the bonds at the end of the five years, but this is a matter of election for the city to exercise. But even this might not be true as against the innocent

holder of the bonds. However, this right has never been denied and was specially extended to the city in the pleadings of the bank, defendant in error, before this court, (Tr., p. 14).

In answer to the suggestion that the bonds are void because the ordinance authorizing the bonds provides that the coupons may be used in payment of taxes, we reply:

First. That the bank, defendant in error, is an innocent purchaser, and had no notice of the ordinance.

Second. That if such provision of the ordinance is void, it does not affect the validity of the bonds, except that the coupons can not be used for the purpose of paying taxes; and that this is not a suit to compel the city of Brenham to accept the coupons in payment of taxes, but simply a suit for debt. A purchaser of bonds is not affected by the statements in the records contrary to the recitals in the bonds.

Mercer Co. *v.* Hackett, 1 Wall., 83;
Clay Co. *v.* Society of Savings, 104 U. S., 579;
Walnut *v.* Wade, 103 U. S., 683.

A point is made by counsel for plaintiff in error, that the bonds were not registered as required by the revised statutes of Texas. In this connection we will say, that the constitution and laws of Texas, and the decisions of the Supreme Court of Texas, recognize the right of cities and towns, incorporated by special laws, to continue their existence under such special charters. The provision of the statutes of Texas requiring the registration of bonds, laws of 1879, in the terms of the act itself, is limited to those cities that incorporate under the general laws of Texas. (Articles 340–341, Title 17, Revised Statutes of Texas.) Article 341 reads as follows:

"The provisions of this title shall not apply to any city until such provisions have been accepted by the city council in accordance with the preceding article."

The city of Brenham, as has been stated, was incorporated under the laws of Texas in February, 1873, and never having accepted the provisions of the general laws of Texas of 1879, in the terms of the law itself its bonds are not required to be registered. The provision of the Texas statute, cited by counsel for the city of Brenham, is also limited by the provisions of the act to cities that incorporate under the general laws; and these cities, acting under special charters, are specially excepted from the requirements of this law. Hence this provision does not apply to the city of Brenham, which then and ever since has been acting under its special charter granted in 1873.

There is but one other question presented by counsel for plaintiff in error, and this incidentally. It is suggested that the demurrer interposed by the city of Brenham should have been sustained, because it is urged that the plaintiff's petition fails to allege for what purpose the bonds were issued, and that it further fails to allege in detail that all the necessary steps were taken by the city council in the issuance of these bonds.

We might simply reply to this that the petition does allege all the facts necessary to be proven to entitle the bank, defendant in error, to recover. (Original petition, Tr., pp. 1 to 4. Supplemental petition, Tr., pp. 11 to 14.)

The general rule as to negotiable securities applies in actions upon bonds. If the city of Brenham was authorized to issue its bonds, and they are valid on their face, the burden of allegation and proof is on the city to show their illegality.

T. & B. Ins. Co. *v.* Turnley, 61 Tex., 365.

The bank, defendant in error, was not required to aver the performance on the part of the city of Brenham of the conditions precedent to the issuance of the bonds (103 U. S., 413).

We wish to present the view that the charter of Brenham granted in 1873 is not affected either by the constitution of Texas adopted in 1876, or the revised statutes of the State passed in 1879.

We copy in full the provisions of the Texas constitution of 1876, and the revised statutes of Texas of 1879, supposed to have a bearing on this case.

Article XI, section 4, constitution of Texas:

"Cities and towns having a population of ten thousand inhabitants or less may be chartered alone by general law. They may levy, assess, and collect an annual tax to defray the current expenses of their local government, but such tax shall never exceed for any one year one-fourth of one per cent., and shall be collectible only in current money." * * *

This provision of the constitution seems to be limited to cities and towns that incorporate under the general laws, and if this be true, can not affect the city of Brenham, which never incorporated under the general laws, but has always acted under its special charter granted in 1873.

Same article, section 5:

"Cities having more than ten thousand inhabitants may have their charters granted or amended by special act of the legislature, and may levy, assess, and collect such taxes as may be authorized by law; but no tax for any purpose shall ever be lawful, for any one year, which shall exceed two and one-half per cent. of the taxable property of such city; and no debt shall ever be created by any city unless at the same time provision be made to assess and collect annually a sufficient sum to pay the interest thereon and create a sinking fund of at least 2 per cent. thereon."

It seems clear to us that the provision is limited to cities having more than ten thousand inhabitants.

Same article, section 7:

"All counties and cities bordering on the coast of the Gulf of Mexico are here by authorized, upon a vote of two-thirds of the taxpayers therein (to be ascertained as may be provided by law), to levy and collect such tax for construction of sea-walls, breakwaters, or sanitary purposes, as may be authorized by law, and may create a debt for such works and issue bonds in evidence thereof. But no debt for any purpose shall ever be incurred in any manner, by any city or county, unless provision is made at the time of creating the same for levying and collecting a sufficient tax to pay the interest thereon and provide at least two per cent. as a sinking fund; and the condemnation of the right of way for such works shall be fully provided for."

It seems clear that this section is limited to cities and towns on the seacoast that wish to build sea-walls, etc., and that it has no application to the city of Brenham.

Same article, section 8, authorizes State aid for sea-walls, etc., but we will not copy it as it is clearly inapplicable to this discussion.

We find in the revised statutes of Texas, 1879, similar restrictive clauses, but these clauses are specially limited to those cities that incorporate under the general laws, and to those that surrender their special charters and avail themselves of the provisions of the general laws. The city of Brenham did neither, but has always acted under a special charter, granted in 1873. But we believe the re-enactment of these restrictive clauses by the legislature to be a legislative construction of the constitution, and we will, therefore, copy the clauses of the general laws of Texas believed to have a bearing on this case.

Title 17, revised statutes of Texas, 1879:

"Article 340. Any city within the limits of this State, containing 1,000 inhabitants or over, may accept the provisions of this chapter in lieu of any existing charter, by a two-thirds vote of the city council of such city."

* * *

The article further provides how it is certified, returned, etc., and the steps necessary.

"Article 341. The provisions of this title shall not apply to any city, until such provisions have been accepted by the city council in accordance with the preceding article."

"Article 421. All bonds shall specify for what purpose they were issued." * * *

"Article 423. It shall be the duty of the mayor, whenever any bond or bonds are issued, to forward the same to the comptroller of public accounts of the State, whose duty it shall be to register said bond or bonds." * * *

"Article 425. The city council shall have power within the city by ordinance to annually levy and collect taxes not exceeding one-fourth of 1 per cent. on the assessed value of all real and personal estate and property in the city not exempt from taxation by the constitution and laws of the State."

"Article 427. No debt shall ever be created by any city unless at the same time provision be made to assess and collect annually a sufficient sum to pay the interest thereon and create a sinking fund of at least 2 per cent. thereon."

It is significant that all of the restrictive clauses in the laws are expressly limited to cities that incorporate under the general laws.

None of these clauses of the laws are applicable to the city of Brenham, and we fail to find any that are, except those contained in its special charter.

We submit that it was not the intention of the framers of the constitution or of the legislature of the State of Texas to interfere with the rights and powers of cities acting under special charters theretofore granted.

Before closing this argument we beg to suggest that bonds issued in a negotiable form involve questions relating to commercial securities, and whether such securities are valid or void, belongs to the dominion of gen-

eral jurisprudence. If there are any rulings of the Supreme Court of Texas adverse to the bonds (but we are not advised of any such rulings), then we would maintain that such rulings would not be respected by the United States Supreme Court, when not satisfactory to its judges, in the case of such bonds in the hands of a citizen of another State who is a *bona fide* holder.

Daniel on Negotiable Instruments, ed. 1891, vol. 2, p. 547, sec. 1526, and authorities cited.

We respectfully submit that there is no error in the judgment of the lower court and ask that it be affirmed.

Respectfully,

HENRY SAYLES,
*Of Counsel for the German-American Bank,*
*Defendant in Error.*